Supreme Court, U.S.
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No. 10

IN THE
Supreme Court of the United States

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY AND SALAH EL DIN AHMED MOHAMMED IDRIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the political question doctrine bars judicial review of statutorily authorized challenges to allegations by government officials that an individual has engaged in terrorism-related activities.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below are identified in the caption of the case.

Petitioner El-Shifa Pharmaceutical Industries Company has no parent corporation and no publicly held corporation has a 10% or greater ownership interest in El-Shifa Pharmaceutical Industries Company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

A. Statement of Facts 2

B. The Proceedings Below 6

REASONS FOR GRANTING THE PETITION 14

I. The Decision Below Is Contrary To This Court's Precedent and Improperly Expands the Scope of the Political Question Doctrine 15

II. The Decision Below Will Have Important and Far-Reaching Consequences 24

CONCLUSION 27

APPENDIX

Opinion of the En Banc United States Court of Appeals for the District of Columbia Circuit (June 8, 2010) 1a

Opinion of the United States Court of Appeals for the District of Columbia Circuit (Mar. 27, 2009) 49a

TABLE OF CONTENTS
(Continued)

Page

Memorandum Order of the United States District Court for the District of Columbia (Mar. 28, 2007) 77a

Order of the United States District Court for the District of Columbia (Nov. 29, 2005) 83a

Memorandum Opinion of the United States District Court for the District of Columbia (Nov. 29, 2005) 84a

Order of the United States Court of Appeals for the District of Columbia Circuit (Aug. 3, 2009) 100a

Order of the United States Court of Appeals for the District of Columbia Circuit (Aug. 3, 2009) 102a

Complaint (Apr. 4, 2001) 104a

Supplemental Complaint (Jan. 11, 2005) 141a

TABLE OF AUTHORITIES

Page(s)

CASES

B.C. Morton International Corp. v. FDIC, 305 F.2d 692 (1st Cir. 1962) 13

Baker v. Carr, 369 U.S. 186 (1962) 11, 15, 19

Bond v. United States, 2 Ct. Cl. 529 (1866) 18

Boumediene v. Bush, 128 S. Ct. 2229 (2008) 17

Bredesen v. Rumsfeld, 500 F. Supp. 2d 752 (M.D. Tenn. 2007) 20

Coleman v. Miller, 307 U.S. 433 (1939) 21

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 25

Community for Creative Non-Violence v. Pierce, 814 F.2d 663 (D.C. Cir. 1987) 13

El-Shifa Pharmaceutical Industries Co. v. United States, 378 F.3d 1346 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005) 7

Expeditions Unlimited Aquatic Enterprises. v. Smithsonian Institution, 566 F.2d 289 (D.C. Cir. 1977) 13

Gilligan v. Morgan, 413 U.S. 1 (1973) 21

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 17, 18, 19, 20

Harrison v. United States, 6 Ct. Cl. 323 (1870) 18

Hill v. United States, 8 Ct. Cl. 470 (1872) 18

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 19

Japan Whaling Association v. American Cetacean Society, 478 U.S. 221 (1986) 15

TABLE OF AUTHORITIES
(Continued)

Page(s)

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 12, 25

La Plante v. United States, 6 Ct. Cl. 311 (1870) 18

Luther v. Borden, 7 How. (48 U.S.) 1 (1849) 21

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 14

Miller v. Lehman, 801 F.2d 492 (D.C. Cir. 1986) 13

Morrison v. Olson, 487 U.S. 654 (1988) 26

New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350 (1989) 14

Nixon v. United States, 506 U.S. 224 (1993) 21

Omar v. Harvey, 479 F.3d 1 (D.C. Cir. 2007), *rev'd sub nom. on other grounds, Munaf v. Geren*, 553 U.S. 674 (2008) 17

Rasul v. Bush, 542 U.S. 466 (2004) 16, 17

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 7

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 12

Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006) 8

Vieth v. Jubelirer, 541 U.S. 267 (2004) 20

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 24

STATUTES

5 U.S.C. § 702 ..... 1, 8, 12

5 U.S.C. § 706 13

28 U.S.C. § 1254 1

TABLE OF AUTHORITIES
(Continued)

Page(s)

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OPINIONS BELOW

The opinion of the *en banc* court of appeals (Pet. App. 1a–48a) is reported at 607 F.3d 836. The panel opinion of the court of appeals (Pet. App. 49a–76a), which was vacated by order of the court (Pet. App. 100a–101a), is reported at 559 F.3d 578. The district court's memorandum opinion dismissing the complaint for lack of subject-matter jurisdiction (Pet. App. 84a–99a) is reported at 402 F. Supp. 2d 267. The district court's memorandum order denying Petitioners' motion to alter judgment (Pet. App. 77a–82a) is unreported but available electronically at 2007 WL 950082.

JURISDICTION

Petitioners seek review of a final decision of the court of appeals entered on June 8, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the application of the political question doctrine to bar review of claims brought pursuant to 5 U.S.C. § 702, which provides:

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or

that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

STATEMENT OF THE CASE

Petitioners seek review of the D.C. Circuit's decision that the political question doctrine bars judicial review of allegations by government officials that Petitioner Salah Idris was a supporter and financier of terrorism-related activities. The court held these allegations nonjusticiable because they were offered as justification for an earlier military strike on a pharmaceutical plant owned by Mr. Idris.

A. Statement of Facts

Petitioners and the El-Shifa Plant — Salah Idris is a successful businessman, originally from Sudan, who became a prominent bank official and citizen of Saudi Arabia. Pet. App. 105a, 108a. Mr. Idris is engaged in business and investment activities in many countries throughout the world, including the United States. Pet. App. 105a. At the time of the events at issue here, Mr. Idris was a well-known supporter of an opposition party within Sudan and regularly wrote columns critical of the Sudanese

government in a newspaper based in Egypt, where he maintained a residence. Pet. App. 119a, 127a–128a. Notwithstanding his differences with the Sudanese government, Mr. Idris made investments in his native Sudan to help alleviate the suffering of its impoverished people. Pet. App. 108a. In March 1998, Mr. Idris purchased Petitioner El-Shifa Pharmaceuticals Industry Company ("El-Shifa") for approximately $18 million. *Id.*

Petitioner El-Shifa is a Sudanese corporation that, before August 20, 1998, operated a pharmaceutical plant near Khartoum in Sudan. Pet. App. 105a–107a. The plant was small and unsophisticated by Western standards, lacking the capacity to manufacture pharmaceuticals from raw chemicals. Pet. App. 106a, 120a–122a. The plant instead was dedicated to repackaging into finished consumer products (*e.g.*, tablets and capsules) pharmaceuticals produced abroad and imported in bulk form. Pet. App. 106a. The plant produced over half of the human and veterinary medicines distributed in Sudan and an even greater percentage of the antibodies used to treat malaria, Sudan's leading cause of death. *Id.* This facility thus served vital humanitarian purposes in Sudan, which is one of the poorest countries in the world. Pet. App. 105a–106a.

Because the plant was one of the few modern facilities in Sudan, it was a source of public pride that was frequently shown to foreign visitors. Pet. App. 109a. These visitors, including Americans and other Westerners, were given the run of the entire plant, which had little security beyond a simple six-foot-tall fence. Pet. App. 109a, 117a, 120a–122a. In addition, a regional development bank that had made

a large loan to El-Shifa frequently sent auditors to monitor the loan and inspect the plant's operations. Pet. App. 108a–109a. None of these many visitors saw that the plant was anything other than what it purported to be: a pharmaceutical repackaging facility. Pet. App. 109a, 117a, 120a–122a.

The Destruction of the El-Shifa Plant — In August 1998, approximately five months after Mr. Idris purchased El-Shifa, U.S. embassies in Kenya and Tanzania were bombed by terrorists associated with Osama bin Laden. Pet. App. 109a–110a. On August 20, 1998, the United States retaliated against these attacks by launching cruise missiles on training camps in Afghanistan operated by groups affiliated with bin Laden. Pet. App. 2a–3a. On the same day, the United States also launched cruise missiles at the El-Shifa plant. *Id.* As President Clinton told the nation that day, the plant was targeted for destruction because the United States believed at the time that the plant was being used to produce materials for chemical weapons. Pet. App. 111a–112a. This charge was based on evidence from a soil sample supposedly obtained from the area by an Egyptian operative several months before the plant was purchased by Mr. Idris. Pet. App. 111a–115a. Government officials also claimed at the time of the attack that the plant did not produce any commercial products, was protected by unusual security measures, and was owned by the government of Sudan, and that bin Laden had a direct financial interest in the plant. Pet. App. 115a–118a.

The destruction of the plant triggered a firestorm of criticism, as journalists quickly uncovered substantial evidence that the plant was a legitimate,

privately owned pharmaceutical plant that provided critical medicines, lacked any ties to bin Laden, and could not have been involved in the production of chemical weapons. Pet. App. 120a–123a, 131a; *see also* Pet. App. 124a–125a (government concessions that it had been mistaken about the plant's purported lack of commercial products, about the supposed direct financial relationship between the plant and bin Laden, and about the plant's purported ownership by the government of Sudan). Among other things, the claimed evidence of chemicals in the soil near the plant was not found in extensive post-attack testing. Pet. App. 115a. One publication noted the "growing consensus" that American intelligence had tragically erred. Pet. App. 121a. Because the attack occurred just days after President Clinton's grand jury testimony on the Monica Lewinsky matter, there was also widespread speculation that the President had launched the attack to divert attention from his embarrassing personal and political problems. Pet. App. 123a.

The Defamation of Salah Idris — In the face of this mounting criticism and to stave off further embarrassment to the administration, government officials reformulated the justification for the attack. Among other things, certain unidentified "intelligence officers" told reporters that Mr. Idris, whom the government had since learned was the plant's actual owner, was "a partner with" and a "front man or agent for" Osama bin Laden and "a financial supporter" of the terrorist groups Islamic Jihad and the National Islamic Front. Pet. App. 125a–127a. According to the officials, these allegations about Mr. Idris were based on "[n]ew evidence obtained since the attack." Pet. App. 126a.

Consistent with these public statements, the Treasury Department froze Mr. Idris's assets pursuant to its terrorism sanctions regulations. Pet. App. 128a.

In fact, these allegations were false and made with knowledge of their falsity or with reckless disregard for their truthfulness. Pet. App. 127a–128a, 136a. As Richard Clarke, then the United States' chief counter-terrorism official, subsequently admitted, the intelligence "never implicated Mr. Idris . . . in any involvement with Osama bin Laden nor any terrorist activities." Pet. App. 141a–142a; *see also* Bill Clinton, *My Life* 805 n* (Arrow Books 2005) (2004) ("[Mr. Idris's] contention [that he himself lacked any connection to al-Qaeda] has recently been supported by Dick Clarke"). Indeed, when Mr. Idris sued to unfreeze his assets, the Treasury Department responded by unblocking the accounts, thereby conceding and mooting the litigation. Pet. App. 126a. Even then, however, an anonymous "senior administration official" continued to defame Mr. Idris by stating to the press that "[t]here are things that Mr. Idris has associated himself with that I think every American would find reprehensible." Pet. App. 128a–129a.

The government's false and defamatory claims about Mr. Idris's alleged ties to terrorism severely damaged Mr. Idris's reputation and impaired his ability to engage in business and investment activities in the United States and other countries around the world. Pet. App. 136a–137a.

B. The Proceedings Below

In July 2000, Mr. Idris and El-Shifa submitted an administrative claim to the CIA seeking

compensation for the destruction of the plant and a retraction of the government's defamatory statements. Pet. App. 132a. After the CIA denied the administrative claim in March 2001, Petitioners filed this lawsuit.[1]

The complaint alleged what was denominated as a "defamation" claim against the United States seeking only non-monetary relief, including a declaration that the accusations against Mr. Idris were false. Pet. App. 136a–137a. As Petitioners explained to the district court, this "defamation" claim was asserted in the alternative under both the judicial-review provisions of the Administrative Procedure Act ("APA") and the common law. *See* Mem. Supp. Mot. Alter J. at 3–4.[2]

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[1] At the same time they submitted their administrative claim, Petitioners sued the United States in the Court of Federal Claims, seeking just compensation for the plant under the Takings Clause. The trial court held that Petitioners would have a valid Takings claim unless the plant was enemy property, but that the political question doctrine barred judicial review of President Clinton's designation of the plant as enemy property. The trial court accordingly dismissed Petitioners' lawsuit, and the Federal Circuit affirmed. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004). This Court denied certiorari. 545 U.S. 1139 (2005).

[2] Petitioners also sought damages under the Federal Tort Claims Act ("FTCA") for the destruction of the plant under theories of negligence and trespass, as well as a declaration that the government violated international law by failing to compensate them after learning the plant had been targeted in error. Pet. App. 133a–135a, 137a–139a. Petitioners did not pursue their FTCA claims on appeal because of an intervening change in law regarding the FTCA's foreign-country exception. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004). Though Petitioners did pursue their law-of-nations claim on appeal, this

The district court dismissed the complaint for lack of subject-matter jurisdiction, Pet. App. 83a, 99a, concluding, among other things, that the defamation claim was barred by sovereign immunity, Pet. App. 91a. Petitioners filed a motion to alter the judgment, explaining that the defamation claim seeks "other than money damages," and therefore falls within the express waiver of sovereign immunity contained in 5 U.S.C. § 702. *See Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) ("there is no doubt that § 702 waives the government's immunity from actions seeking relief 'other than money damages'" (internal quotation marks omitted)). The court denied the motion to alter the judgment, holding that, even assuming § 702 waived the government's sovereign immunity, the defamation claim was not reviewable because Petitioners had failed to allege final agency action. Pet. App. 79a–81a.

By a 2-1 decision, a panel of the D.C. Circuit affirmed on the alternative ground that Petitioners' defamation claim is nonjusticiable under the political question doctrine. The panel majority reasoned that the doctrine bars judicial review of "the President's battlefield decisions," and that the defamation claim presents questions "'inextricably intertwined' with the underlying decision to attack the [plant]." Pet. App. 55a–56a. Specifically, the majority asserted, the district court would need to determine the truth or falsity of the government's statements about Mr. Idris, "meaning a judicial decision for the plaintiffs

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Petition seeks review of the ruling below only to the extent it holds that the defamation claim is nonjusticiable.

would directly contradict the Clinton Administration's ultimate stated justification for launching the missile strike." Pet. App. 58a–59a.

Judge Ginsburg dissented in part. He noted that, because Petitioners allege that the defamatory statements were *post hoc* justifications having nothing to do with the decision to attack the plant, the defamation claim does not call into question the basis for the military strike. Pet. App. 67a–68a. The majority opinion must therefore mean that *all* publicly asserted justifications for military action are themselves strategic military and foreign-policy decisions categorically insulated from judicial review. Pet. App. 70a. This proposition, Judge Ginsburg observed, "is not only novel and frightening, but ignores Supreme Court precedent"—in particular, a "clear line of cases in which [the Supreme Court and the D.C. Circuit] have heard, without constitutional qualms, an individual's statutory challenge to his designation as an enemy combatant, thereby supposedly 'becoming arbiter of the President's battlefield actions.'" Pet. App. 70a, 72a–73a. Concluding that the political question doctrine is therefore inapplicable, Judge Ginsburg would have "le[ft] it to the district court on remand to address . . . in the first instance" whether Petitioners have a claim under either the common law or the APA. Pet. App. 74a.

On Petitioners' request, the D.C. Circuit vacated the panel decision and agreed to rehear the case *en banc*. Pet. App. 100a–101a. Following briefing and argument, the court again affirmed on the ground that the defamation claim presented a nonjusticiable

political question, this time dividing 5-4 on that question.

In an opinion for the court joined by four other judges, Judge Griffith "beg[a]n" with the proposition that "courts cannot reconsider the wisdom of discretionary foreign policy decisions," including the decision to launch a military attack abroad. Pet. App. 17a. The defamation claim implicated this rule, the majority reasoned, because it "would require the court to reconsider the merits of the decision to strike the El-Shifa plant by determining whether the government's justifications for the attack were false." Pet. App. 20a. Because the allegations about Mr. Idris's purported terrorist ties "closely track[ed] the President's own description of his reasons for launching the attack," the majority reasoned, "[d]eclaring these later statements [about Mr. Idris] true or false would require [the court] to make the same judgment about the President's initial justification for the attack." Pet. App. 22a–23a.

The majority opinion sought to distinguish this case from this Court's precedents permitting judicial review of the enemy status of persons seized by the U.S. military on the battlefield. Those cases do not implicate the political question doctrine, the majority reasoned, because the Suspension Clause of the Constitution "specifically contemplates a judicial role" in review of prolonged Executive detention. Pet. App. 25a. "[F]or the same reasons," the majority asserted, cases reviewing battlefield "enemy property" seizures were "not helpful" to Petitioners, since this Court "has suggested that judicial review of enemy-property designations made to effect

statutorily authorized asset seizures is constitutionally mandated." Pet. App. 26a.

Finally, the majority opinion rejected the assertion of the four concurring judges that Petitioners' defamation claim is so legally insubstantial that it should be dismissed for lack of subject-matter jurisdiction, quoting Judge Ginsburg's earlier observation that "'[s]ome of our cases do imply a plaintiff may obtain a retraction from the United States for defamation by one of its officers.'" Pet. App. 29a (quoting Pet. App. 74a).

In two separate opinions, four judges concurred in the judgment but disagreed with the majority's decision holding the defamation claim nonjusticiable. In an opinion joined by Judge Rogers, Judge Ginsburg concluded that the majority opinion "expands the political question doctrine well beyond the bounds delineated in *Baker v. Carr*, 369 U.S. 186 (1962)." Pet. App. 30a. Under *Baker*, Judge Ginsburg explained, a court must make a "'discriminating inquiry . . .' in order to detect 'a political *question's* presence." Pet. App. 31a (emphasis added). The majority opinion, by contrast, requires a court "first to identify some 'conduct' or 'decision' (the opinion alternates) constitutionally committed to the Executive and then to ask whether the plaintiff's 'claim[] . . . calls into question,' 'require[s] the court to reassess,' or is 'inextricably intertwined with' that Executive conduct or decision." *Id.* (alterations and ellipsis in original). Thus, "[u]nder the [c]ourt's new political *decision* doctrine . . . even a straightforward statutory case, presenting a purely legal question, is non-justiciable if deciding it could merely reflect adversely upon a decision

constitutionally committed to the President." Pet. App. 32a (emphasis added). "The result of staying the judicial hand" in this manner, Judge Ginsburg concluded, "is to upset rather than to preserve the constitutional allocation of powers between the executive and the legislature." Pet. App. 33a.

Judge Kavanaugh also filed an opinion concurring in the judgment. In a portion of that opinion joined by Judges Sentelle, Ginsburg, and Rogers, Judge Kavanaugh explained that "[f]ederal courts lack subject matter jurisdiction over claims that are 'so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" Pet. App. 34a (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). The defamation claim fell into this category, Judge Kavanaugh concluded, because Congress has not created a defamation cause of action against the United States and, without such a statutory right of action, a common-law claim may not be asserted against the United States. Pet. App. 35a–37a. Judge Kavanaugh also argued that a claim under the APA "would face a variety of hurdles." Pet. App. 37a n.1. As noted, however, a majority of the court expressly rejected this line of reasoning. Pet. App. 29a.[3]

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[3] In fact, numerous cases hold that the victim of a tort committed by a federal officer in his official capacity has a common-law claim for equitable relief against the United States (assuming a waiver of sovereign immunity, which is provided here by 5 U.S.C. § 702). *See, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951) (plurality op.) (groups defamed by their inclusion on government's list of subversive organizations stated an equitable claim for "violat[ion of their] common-law right to be free from

In a portion of his concurring opinion joined only by Judge Sentelle, Judge Kavanaugh also criticized the majority's invocation of the political question doctrine, but for a different reason than Judge Ginsburg. Judge Kavanaugh emphasized that this Court "has invoked the political question doctrine only in cases alleging violations of the Constitution," and that this is not such a case. Pet. App. 41a. When applying the political question doctrine in a statutory case, Judge Kavanaugh explained, a court, by refusing to give effect to a statute regulating Executive conduct, "necessarily would be holding [as a matter of separation of powers] that Congress is

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defamation"); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987) ("declaratory and injunctive relief may be obtained against defamatory statements by government officials"); *Expeditions Unlimited Aquatic Enters. v. Smithsonian Inst.*, 566 F.2d 289, 294 n.16 (D.C. Cir. 1977) (en banc) (same); *B.C. Morton Int'l Corp. v. FDIC*, 305 F.2d 692, 695–99 (1st Cir. 1962) (recognizing availability of injunctive and declaratory relief to remedy defamation by federal agency). Petitioners have also pleaded a viable claim under the APA that the CIA's refusal to retract the defamatory allegations was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *see also* Pet. App. 67a (Ginsburg, J., dissenting in part) ("the CIA had denied Idris's request for a retraction, which certainly seems to be final agency action"); *Miller v. Lehman*, 801 F.2d 492, 496 (D.C. Cir. 1986) (agency's "denial of an application for correction of . . . records is a final agency action subject to review under the standards of the [APA]"). Contrary to Judge Kavanaugh's misapprehension (Pet. App. 37a n.1), therefore, Petitioners are indeed alleging that the CIA's refusal to retract a demonstrably false defamatory statement was, among other things, arbitrary and capricious.

unable to constrain Executive conduct in the challenged sphere of action." Pet. App. 42a. Thus:

> Applying the political question doctrine in statutory cases . . . would not reflect benign deference to the political branches. Rather, that approach would systematically favor the Executive Branch over the Legislative Branch — without the courts' acknowledging as much or grappling with the critical separation of powers and Article II issues. . . .

In short, the question whether a statute intrudes on the Executive's exclusive, preclusive Article II authority must be confronted directly through a careful analysis of Article II — not answered by backdoor use of the political question doctrine, which may *sub silentio* expand executive power in an indirect, haphazard, and unprincipled manner. Pet. App. 43a–44a.

REASONS FOR GRANTING THE PETITION

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). With the political question doctrine, this Court has recognized an exceedingly narrow exception to this foundational principle and to the related rule that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989). With its decision in this case, however, a narrow majority of the D.C. Circuit has "expand[ed] the political question doctrine well beyond the bounds delineated in" this Court's precedents, Pet. App. 30a (Ginsburg, J., concurring in the judgment), and, in doing so, has "*sub silentio*

expand[ed] executive power in an indirect, haphazard, and unprincipled manner," Pet. App. 44a (Kavanaugh, J., concurring in the judgment). Review is warranted to correct these profound errors in this critically important area.

I. The Decision Below Is Contrary To This Court's Precedent and Improperly Expands the Scope of the Political Question Doctrine

1. The decision below directly and irreconcilably conflicts with this Court's recent jurisprudence holding justiciable lawsuits challenging the factual basis for the government's designation of persons as enemy combatants, even where those lawsuits "call[] into question," "require the court to reassess," and are "inextricably intertwined with" (Pet. App. 13a, 15a, 25a) the justifications for prior military and battlefield decisions.

The political question doctrine focuses primarily on whether resolution of a disputed issue would require a court to make "policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Because the doctrine is one of "political questions" not "political cases," its application requires a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Baker v. Carr*, 369 U.S. 186, 211–12, 217 n.21 (1962).

Applying these principles here, the majority below began with the proposition that the political question doctrine would bar a court from passing judgment on the "wisdom" of the President's decision to bomb the El-Shifa plant. Pet. App. 17a. According to the majority, it follows that a court would also be precluded from passing judgment on the accuracy of the facts on which that military decision was based. Pet. App. 17a–18a. And it follows further, the majority reasoned, that a challenge to the government's subsequent designation of Mr. Idris as a supporter of terrorism is likewise nonjusticiable because that designation "essentially repeat[ed] the President's initial justification for the strike," Pet. App. 22a–23a, and, as a result, "[a] court's pronouncement that [Mr. Idris] had no financial ties to bin Laden would directly contradict the government's justification for the attack," Pet. App. 24a.[4]

This reasoning cannot be reconciled with this Court's recent detainee cases. After September 11, 2001, the government argued that "[t]he 'enemy' status of aliens captured and detained during war is a quintessential political question on which the courts respect the actions of the political branches." Brief for the Respondents at 35, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 425739, at *35; *see also id.* at 37 (because "active fighting is still

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[4] The majority's conclusion that the allegations about Mr. Idris "essentially repeat" the initial justification for the strike (Pet. App. 22a–23a) is incorrect. *See supra* pp. 4–6 (describing how government's publicly asserted justifications evolved over time); Pet. App. 110a–127a (same). For the reasons explained herein, however, the decision below is grievously wrong even assuming the majority is correct on this point.

ongoing in Afghanistan and elsewhere . . . this litigation implicates political questions that the Constitution leaves to the President"). This Court rejected these arguments and has endorsed judicial review of enemy-status designations of persons seized by U.S. military forces on active battlefields. *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

The petitioner in *Hamdi*, for instance, had been detained by government officials in the course of the United States' military operations in Afghanistan, and the "sole evidentiary support" for his ongoing detention was the affidavit of an official "familiar with the facts and circumstances related to [Hamdi's] capture . . . and his detention by U.S. military forces." 542 U.S. at 510, 512 (plurality op.). Despite the fact that the asserted justification for imprisoning Hamdi was thus *identical* to the justification for the battlefield decision to capture him, this Court nevertheless rejected the government's contention that the Judiciary could not review the accuracy of the government's subsequent classification of Hamdi as an enemy combatant to justify his continued imprisonment. *Id.* at 535–36. Separation of powers, the Court noted, would be "turn[ed] . . . on its head" were the Judiciary to be precluded from assessing "the factual basis for" the enemy-combatant designation. *Id.* at 536–37. As the court below has itself recognized, *Hamdi* thus "unequivocally rejects" the contention that the political question doctrine "preclude[s] courts from inquiring into the factual basis of an enemy combatant designation," *Omar v. Harvey*, 479 F.3d 1, 10 (D.C. Cir. 2007), *rev'd sub nom. on other grounds*, *Munaf v. Geren*, 553 U.S. 674

(2008), even where the designation "essentially repeats the . . . initial justification" (Pet. App. 22a) for a capture and detention on a foreign battlefield.[5]

Under a straightforward application of *Hamdi* and its progeny, a challenge to the accuracy of facts offered to justify a prior military decision is justiciable, even though a judicial decision for the plaintiff "would directly contradict the government's justification for" (Pet. App. 24a) the military decision. Thus, just as Hamdi's claim that he was not an enemy combatant was justiciable even though a judgment in Hamdi's favor would have "contradicted" the military's justification for its battlefield seizure of him, Petitioners' claim that Mr. Idris was not a supporter of terrorism is justiciable even though a judgment in Mr. Idris's favor would (in the same sense of the word) "contradict" the government's justification for its destruction of the El-Shifa plant.

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[5] Though the detainee cases sharply divided this Court in other respects, the ruling on justiciability commanded broad support. *But see Hamdi*, 542 U.S. at 585–86 (Thomas, J., dissenting) ("we lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches"). In this respect, *Hamdi* simply affirms a long tradition of judicial review of enemy and enemy-property designations arising out of battlefield decisions during earlier wars. *See, e.g.*, *Bond v. United States*, 2 Ct. Cl. 529, 535 (1866) (adjudicating that claimant "has never given aid or comfort to the recent rebellion" and ordering compensation for property seized by military); *Harrison v. United States*, 6 Ct. Cl. 323, 327 (1870) (determining that nonresident aliens had not aided the Confederacy and ordering compensation for property seized by military); *La Plante v. United States*, 6 Ct. Cl. 311, 321–23 (1870) (same); *Hill v. United States*, 8 Ct. Cl. 470, 471–72 (1872) (same).

The majority below attempted to distinguish the detainee cases on the ground that review of Executive detention is constitutionally committed to the Judiciary by the Suspension Clause. Pet. App. 25a–26a. But this purported distinction misconstrues the nature of the inquiry under the political question doctrine. As explained above, that inquiry is not whether a particular case or a particular exercise of executive authority is within the competency of the Judicial Branch to review, but whether a "particular question posed" is. *Baker*, 369 U.S. at 211. And the "particular question posed" by this case—whether the evidence supports an official allegation that a certain individual is an enemy of the United States engaged in terrorism-related activities—is *the exact same* question posed in the detainee cases. In all relevant respects, therefore, this case is indistinguishable from *Hamdi*.[6]

2. Review is also warranted because, as Judge Kavanaugh explained, the majority below improperly applied the political question doctrine to preclude judicial review of a non-constitutional question. Pet.

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[6] The decision below also cannot be reconciled with *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). *Hutchinson* involved the Speech and Debate Clause, which, like the political question doctrine, prevents courts from passing judgment on acts constitutionally committed to the Legislative Branch. In *Hutchinson*, this Court held that although a senator cannot be sued for defamatory statements in a speech given on the floor of the Senate, he nevertheless "may be held liable for republishing [those] defamatory statements" in press releases and newsletters. *Id.* at 127–28. *Hutchinson* thus recognizes a constitutionally significant distinction between nonjusticiable activities and "relat[ed]" conduct and statements (*id.* at 131) that "tell the public about [the nonjusticiable] activities" (*id.* at 133).

App. 41a (Kavanaugh, J., concurring in the judgment) ("The Supreme Court has never applied the political question doctrine in a case involving alleged *statutory* violations. Never."); *see also Bredesen v. Rumsfeld*, 500 F. Supp. 2d 752, 762 (M.D. Tenn. 2007) ("it is well-settled that the political question doctrine applies only to constitutional questions, not to questions of statutory violations").

Properly understood, the political question doctrine bars judicial involvement in determining the parameters of certain *constitutional* powers, rights, duties, and privileges, either where the Constitution itself commits determination of those matters to one of the political branches or where the constitutional question at issue is otherwise unfit for judicial decision. The doctrine thus recognizes that in some instances Congress or the President, rather than the Judiciary, will be the final expositor of a constitutional provision. "The political question doctrine," in other words, "reflects a constitutional design that does not require the judiciary to supply the substantive content of all the Constitution's provisions." Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 239 (2002). *See generally id.* at 239–73 (tracing the doctrine's development).

Thus, this Court has consistently invoked the political question doctrine *only* to prevent the Judiciary from deciding particular *constitutional* questions. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (plurality op.) ("neither Article I, § 2, nor the Equal Protection Clause, nor . . . Article I, § 4, provides a judicially enforceable limit on the political

considerations that the States and Congress may take into account when districting"); *Nixon v. United States*, 506 U.S. 224, 228–38 (1993) (meaning of the word "try" in the Constitution's Impeachment Trial Clause is nonjusticiable); *Gilligan v. Morgan*, 413 U.S. 1, 6–7 (1973) (Constitution's Militia Clause vests in the political branches responsibility for National Guard's compliance with the Due Process Clause); *Coleman v. Miller*, 307 U.S. 433, 452–54 (1939) (time for ratifying constitutional amendments under Article V is nonjusticiable); *Luther v. Borden*, 7 How. (48 U.S.) 1, 41 (1849) (protections afforded by Constitution's Guarantee Clause are nonjusticiable).

Academic commentators and treatise writers have likewise understood this Court's "political question" precedents to "h[o]ld that certain allegations of *unconstitutional* government conduct should not be ruled on by the federal courts" and "that *constitutional* interpretation in these areas should be left to the politically accountable branches." Erwin Chemerinsky, *Constitutional Law* § 2.8.1, at 129 (3d ed. 2006) (emphases added); *see also* 1 Laurence H. Tribe, *American Constitutional Law* § 3–13, at 367 (3d ed. 2000) ("[o]ne conventional view of the [political question] doctrine grounds it in the assumption that there are certain *constitutional* questions which are inherently non-justiciable" (emphasis added and other emphasis removed)); *id.* at 385 (doctrine "require[s] federal courts to determine whether *constitutional* provisions which litigants would have judges enforce do in fact lend themselves to interpretation as guarantees of enforceable rights" (emphasis added)); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597, 599 (1976) ("a political question is one in which

the courts forego their unique and paramount function of judicial review of *constitutionality*" such that "some *constitutional* requirements are entrusted exclusively and finally to the political branches of government for 'self-monitoring'" (emphases added)); Barkow, *supra*, at 239–40.

As Judge Kavanaugh explained, there is "good reason" that this Court's application of the political question doctrine has been limited to constitutional questions. Pet. App. 42a. Where a litigant invokes a constitutional right or privilege, or seeks to limit the exercise of a governmental actor's constitutional powers or prerogatives, a court must determine whether the Constitution itself, as the source of that right, privilege, power, or prerogative, permits or precludes a judicial role in deciding the question raised. By contrast, where a litigant invokes a statutory right of action against the government, *Congress* in the exercise of its lawmaking power has made the determination that the matter at issue is appropriate for judicial review. To hold such a matter nonjusticiable, therefore, a court must necessarily conclude that Congress exceeded its own powers when it authorized the courts to act.

A court's failure to give effect to a statute regulating Executive conduct thus amounts to an implicit holding that Congress's attempt to "constrain Executive conduct in the challenged sphere of action" violates the separation of powers. Pet. App. 42a. And while there may be instances in which a congressionally authorized right of action does impermissibly intrude upon the Executive's constitutional authority, courts must scrutinize such claims under the rubric of separation of powers, and

the Executive must shoulder the heightened legal and political burdens of prevailing in an inter-branch dispute. Holding such matters nonjusticiable under the political question doctrine thus is not "benign deference" to the political branches, but rather is an approach that "systematically favor[s] the Executive Branch over the Legislative Branch — without the courts' acknowledging as much or grappling with the critical separation of powers and Article II issues." Pet. App. 43a; *see also* Pet. App. 33a ("[t]he result of staying the judicial hand is to upset rather than preserve the constitutional allocation of powers between the executive and the legislature").

The opinion below departs from these fundamental principles. This case involves no claim by Petitioners of any constitutional right and no allegation that the President or any other officer exceeded his constitutional authority. Rather, Petitioners' defamation claim relies on the APA's statutory cause of action for review of agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and (in the alternative) on the APA's waiver of the United States' sovereign immunity from common-law claims for non-monetary relief arising out of torts committed by federal officers. *See supra* pp. 8, 13 n.3. And Petitioners seek, not the resolution of any question of constitutional law, but a ruling on the factual accuracy of the government's claims about Mr. Idris. Though it has not yet done so, the United States is entitled to argue that Congress violated the separation of powers in making these causes of action applicable to this lawsuit. But the political question doctrine does not render the lawsuit nonjusticiable.

3. In sum, the majority below misapplied the political question doctrine in a manner that both conflicts with this Court's recent detainee cases and improperly precludes judicial consideration of a non-constitutional question. The Court should grant certiorari to review and correct these fundamental errors.

II. The Decision Below Will Have Important and Far-Reaching Consequences

"'[W]hat is at stake'" in this case "'is the equilibrium established by our constitutional system.'" Pet. App. 44a (Kavanaugh, J., concurring in the judgment) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)). The decision below expands this Court's narrow political question doctrine in a manner that threatens individual liberty and upsets the separation of powers between the three Branches.

The notion that courts are categorically precluded from assessing the validity of accusations made by the government against its own citizens and other individuals whenever the accusations are claimed to be a justification for a prior military, national-security, or foreign-policy decision is a "frightening" proposition. Pet. App. 70a (Ginsburg, J., dissenting in part). This is so because the government's incentives to dissemble and lie—and to falsely malign whistleblowers, political opponents, unpopular groups, and innocent bystanders—are at their zenith precisely where (as in this case) officials seek to protect themselves from political fallout by covering up embarrassing errors and missteps in politically sensitive areas. History is filled with examples of such abuses, from the McCarthy-era Attorney

General's List of Subversive Organizations, *see McGrath*, 341 U.S. at 126–29 (plurality op.), to more recent events like the leaked false charges in national-security incidents involving Steven Hatfill, *see* Scott Shane & Eric Lichtblau, *Scientist Is Paid Millions by U.S. in Anthrax Suit*, N.Y. Times, June 28, 2008, at A1; Richard Jewell, *see Reno Apologizes to Ex-Suspect in Bombing*, N.Y. Times, Aug. 1, 1997, at A10; and Wen Ho Lee, *see* Adam Liptak, *Atomic Scientist Settles Privacy Suit Against U.S.*, N.Y. Times, June 2, 2006.

The application of the political question doctrine to allegations offered in justification of national-security decisions would bar review of these and many other instances of government misconduct. And the abandonment of *Baker*'s instruction to perform a discriminating analysis of the particular *question* posed portends an exponentially greater and less predictable application of the doctrine, and will open a new avenue for the government to use "military or war objectives" to shroud abusive conduct from judicial review. Conduct that has been traditionally reviewable, including run-of-the-mill torts and non-discretionary acts like the violation of an unambiguous statutory directive will now be nonjusticiable whenever the government can show that the challenged conduct might "merely reflect adversely upon a decision constitutionally committed to the President." Pet. App. 32a (Ginsburg, J., concurring in the judgment). In light of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), the Court should grant certiorari and

firmly reject this extension of the political question doctrine.

Whether the political question doctrine may be used to bar judicial review of non-constitutional questions is also a matter of extraordinary importance. By applying the doctrine to preclude adjudication of a congressionally authorized cause of action challenging Executive action, the decision below improperly "loads the dice against the Legislative Branch" in cases like this one. Pet. App. 43a. "[W]here the issue pertains to separation of powers," however, "and the political branches are . . . in disagreement, neither can be presumed correct. . . . The playing field for [such a] case, in other words, [must be] a level one." *Morrison v. Olson*, 487 U.S. 654, 704–05 (1988) (Scalia, J., dissenting). The D.C. Circuit's dramatic alteration of the balance of power among the three Branches should not be implemented absent review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 16, 2009 Decided June 8, 2010

No. 07-5174

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY
AND
SALAH EL DIN AHMED MOHAMMED IDRIS,
APPELLANTS

v.

UNITED STATES OF AMERICA,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 01cv00731)

Christian G. Vergonis argued the cause for appellants. With him on the briefs were *Stephen J. Brogan*, *Timothy J. Finn*, and *Katherine E. Stern*.

Beth S. Brinkmann, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for appellee. With her on the brief were *Mark B. Stern* and *Dana J. Martin*, Attorneys.

Before: SENTELLE, *Chief Judge*, and GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

Opinion concurring in the judgment filed by *Circuit Judge* GINSBURG, with whom *Circuit Judge* ROGERS joins.

Opinion concurring in the judgment filed by *Circuit Judge* KAVANAUGH, with whom *Chief Judge* SENTELLE joins, and with whom *Circuit Judges* GINSBURG and ROGERS join as to Part I.

GRIFFITH, *Circuit Judge*: The owners of a Sudanese pharmaceutical plant sued the United States for unjustifiably destroying the plant, failing to compensate them for its destruction, and defaming them by asserting they had ties to Osama bin Laden. The district court dismissed their complaint. A panel of this court affirmed, holding that the political question doctrine barred the plaintiffs' claims. After granting rehearing *en banc*, we now affirm the district court on the same ground.

I.

On August 7, 1998, the terrorist network headed by Osama bin Laden bombed United States embassies in Kenya and Tanzania. Hundreds were killed and thousands injured. On August 20, the United States responded by launching nearly simultaneous missile strikes against two targets: a

terrorist training camp in Afghanistan and a factory in Sudan believed to be "associated with the bin Ladin network" and "involved in the production of materials for chemical weapons." President William J. Clinton, Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460, 1461 (Aug. 20, 1998) [hereinafter Address to the Nation].

President Clinton addressed the American people, explaining "the objective of this action and why it was necessary." *Id.* at 1460. "Our target was terror; our mission was clear: to strike at the network of radical groups affiliated with and funded by Usama bin Ladin, perhaps the preeminent organizer and financier of international terrorism in the world today." *Id.* "The risks from inaction, to America and the world, would be far greater than action," the President proclaimed, "for that would embolden our enemies, leaving their ability and their willingness to strike us intact." *Id.* At 1461.

In a letter to the Congress "consistent with the War Powers Resolution," the President reported that the strikes "were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities" and "were intended to prevent and deter additional attacks by a clearly identified terrorist threat." President William J. Clinton, Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1464, 1464 (Aug. 21, 1998). The following day, in a radio address to the nation, President Clinton explained his decision to take military action, stating, "Our goals were to disrupt bin Ladin's

terrorist network and destroy elements of its infrastructure in Afghanistan and Sudan. And our goal was to destroy, in Sudan, the factory with which bin Ladin's network is associated, which was producing an ingredient essential for nerve gas." President William J. Clinton, The President's Radio Address, 2 PUB. PAPERS 1464, 1465 (Aug. 22, 1998). Citing "compelling evidence that the bin Ladin network was poised to strike at us again" and was seeking to acquire chemical weapons, the President declared that "we simply could not stand idly by." *Id.*

Other government officials elaborated upon the President's justifications for the attack on the plant. On the day of the strike, the Secretary of Defense stated that bin Laden "had some financial interest in contributing to this particular facility." Compl. at 13, *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267 (D.D.C. 2005) (Civ. No. 01-731). An unnamed "senior intelligence official" asserted at a press briefing, "[W]e know that bin Laden has made financial contributions to the Sudanese Military Industrial Complex[,] of which, we believe, the Shifa pharmaceutical plant is part." *Id.* And on August 23, the National Security Advisor maintained that "Osama bin Laden was providing key financial help for the plant." *Id.*

The plaintiffs in this case are the El-Shifa Pharmaceutical Industries Company (El-Shifa), the owner of the plant, and Salah El Din Ahmed Mohammed Idris (Idris), the principal owner of El-Shifa. They allege that striking the plant was a mistake, that it "was not a chemical weapons facility, was not connected to bin Laden or to terrorism, and was not otherwise a danger to public health and

safety." *Id.* at 6. Instead, the plaintiffs contend, the plant was Sudan's largest manufacturer of medicinal products, responsible for producing over half the pharmaceuticals used in Sudan. Because the case comes to us on appeal from a dismissal for lack of subject-matter jurisdiction, we take the plaintiffs' allegations as true. *See Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 572 n.1 (D.C. Cir. 2003).

According to the plaintiffs, within days of the attack, the press debunked the President's assertions that the plant was involved with chemical weapons and associated with bin Laden. Confronted with their error, senior administration and intelligence officials backpedaled, issuing what the plaintiffs characterize as "revised" or "new justifications" for the strike and conceding that any relationship between bin Laden and the plant was "indirect." Compl. at 17–19. Although the United States attacked the plant without knowing who owned it, officials learned within three days of the strike that Idris was the owner. After that point, "unidentified U.S. government officials" began telling reporters that Idris maintained direct or indirect financial relations with bin Laden, purchased the plant on bin Laden's behalf, acted as a front man or agent for bin Laden in Sudan, and had "ties" to bin Laden. *Id.* at 19–20. The plaintiffs contend that neither the contemporaneous nor post-hoc justifications for the attack were true: "All of the justifications for the attack advanced by the United States were based on false factual premises and were offered with reckless disregard of the truth based upon grossly incomplete research and unreasonable analysis of inconclusive intelligence." *Id.* at 7.

This lawsuit is only one of several actions the plaintiffs pursued to recoup their losses. They also sued the United States in the Court of Federal Claims, seeking $50 million as just compensation under the Takings Clause of the Constitution. The court dismissed the suit on the ground that "the enemy target of military force" has no right to compensation for "the destruction of property designated by the President as enemy war-making property." *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 774 (2003). The United States Court of Appeals for the Federal Circuit affirmed, holding that the plaintiffs' takings claim raised a nonjusticiable political question. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1361–70 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005). On the legislative front, one member of the House of Representatives introduced a bill to compensate those who suffered injuries or property damage in the missile strike, *see* H.R. 894, 107th Cong. (2001), and a resolution directing the claims court to investigate the matter and issue a report to the House, *see* H.R. Res. 81, 107th Cong. (2001) (citing 28 U.S.C. §§ 1492, 2509). Both the bill and the resolution died in committee.

The plaintiffs brought this action in the United States District Court for the District of Columbia after the CIA denied their requests for compensation for the plant's destruction and for a retraction of the allegations that the plaintiffs were involved with terrorism. The plaintiffs sought at least $50 million in damages under the Federal Tort Claims Act, claiming negligence in the government's investigation of the plant's ties to chemical weapons and Osama bin Laden and trespass in its destruction of the plant

"without consent or justification." Compl. at 27. Their complaint also included a claim under the law of nations seeking a judicial declaration that the United States violated international law by failing to compensate them for the unjustified destruction of their property. Finally, the plaintiffs claimed that the President and other senior officials defamed them by publishing false statements linking Idris and the plant to bin Laden, international terrorism, or chemical weapons, knowing those statements were false or making them with reckless disregard for their veracity. The plaintiffs sought extraordinary relief: "[a] declaration that claims made by agents of the United States that Mr. Idris or El-Shifa are connected to Osama bin Laden, terrorist groups or the production of chemical weapons are false and defamatory" and "[a]n order requiring the United States to issue a retraction [of those claims] in the form of a press release." *Id.* at 31.

The district court granted the government's motion to dismiss the complaint for lack of subject-matter jurisdiction, *see* FED. R. CIV. P. 12(b)(1), concluding that sovereign immunity barred all of the plaintiffs' claims. *See El-Shifa*, 402 F. Supp. 2d at 270–73. The court also noted that the complaint "likely present[ed] a nonjusticiable political question." *Id.* At 276. The plaintiffs filed a motion to alter the judgment with respect to their claims for equitable relief, which the district court denied. *See El-Shifa Pharm. Indus. Co. v. United States*, No. 01-731, 2007 WL 950082 (D.D.C. Mar. 28, 2007).

The plaintiffs appealed, challenging only the dismissal of their claims alleging a violation of the law of nations and defamation. The plaintiffs have

abandoned any request for monetary relief, but still seek a declaration that the government's failure to compensate them for the destruction of the plant violated customary international law, a declaration that statements government officials made about them were defamatory, and an injunction requiring the government to retract those statements. A divided panel of this court affirmed the district court, holding that these claims are barred by the political question doctrine. *See El-Shifa Pharm. Indus. Co. v. United States*, 559 F.3d 578 (D.C. Cir. 2009). We vacated the panel's judgment and ordered rehearing *en banc*. *See El-Shifa Pharm. Indus. Co. v. United States*, 330 F. App'x 200 (D.C. Cir. 2009).

II.

"It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), but some "[q]uestions, in their nature political," are beyond the power of the courts to resolve, *id.* at 170. The political question doctrine is "essentially a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 217 (1962), and "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). *See also United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (explaining that the "doctrine is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government").

That some governmental actions are beyond the reach of the courts reflects the Constitution's limitation of the "judicial power of the United States" to "cases" or "controversies." U.S. CONST. art. III; *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does."); *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 215 (1974) ("[T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies both the standing and political question doctrines . . . ."). "It is therefore familiar learning that no justiciable 'controversy' exists when parties seek adjudication of a political question." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007).

In the seminal case of *Baker v. Carr*, the Supreme Court explained that a claim presents a political question if it involves:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of

> embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. "To find a political question, we need only conclude that one [of these] factor[s] is present, not all." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

Disputes involving foreign relations, such as the one before us, are "quintessential sources of political questions." *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006). Because these cases raise issues that "frequently turn on standards that defy judicial application" or "involve the exercise of a discretion demonstrably committed to the executive or legislature," *Baker*, 369 U.S. at 211, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292 (1981). "Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Even in the context of military action, the courts may sometimes have a role. *See Gilligan v. Morgan*, 413 U.S. 1, 11–12 (1973). Therefore, we must conduct "a discriminating analysis of the particular question posed" in the "specific case" before the court to determine whether the political question doctrine prevents a claim from going forward. *Baker*, 369 U.S. at 211; *see, e.g.*, *Wilson v. Libby*, 535 F.3d 697, 703–04 (D.C. Cir. 2008) (holding the political question doctrine did not bar a challenge to disclosures "identifying a previously covert agent" and therefore "implicat[ing] national security" because the plaintiffs' claims did "not challenge[] any

foreign policy or national security decisions entrusted to the Executive Branch").

In undertaking this discriminating analysis, we note, for example, that the political question doctrine does not bar a claim that the government has violated the Constitution simply because the claim implicates foreign relations. *See I.N.S. v. Chadha*, 462 U.S. 919 (1983) (holding the one-House legislative veto unconstitutional despite its use in matters of foreign affairs and the war powers). Because the judiciary is the "ultimate interpreter of the Constitution," *Baker*, 369 U.S. at 211, in most instances claims alleging its violation will rightly be heard by the courts. *See, e.g.*, *Chadha*, 462 U.S. at 941–42 ("No policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts."). *But see, e.g.*, *Nixon v. United States*, 506 U.S. 224 (1993) (whether Senate has violated its duty to "try" impeachments presents a political question); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (Guarantee Clause is enforceable only by Congress). Similarly, that a case may involve the conduct of the nation's foreign affairs does not necessarily prevent a court from determining whether the Executive has exceeded the scope of prescribed statutory authority or failed to obey the prohibition of a statute or treaty. *See Japan Whaling*, 478 U.S. at 230 ("[O]ne of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because" of the "interplay" between the statute and "the conduct of this Nation's foreign relations."); *see, e.g.*, *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S.

243, 254 n.25 (1984) (holding the political question doctrine does not bar consideration of whether a Civil Aeronautics Board order is inconsistent with the Warsaw Convention); *see also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 723 (2008) ("If there is a party with constitutionally sufficient standing to demand judicial protection from a presidential refusal to obey a statute during war, it is not clear why there should be a general rule that courts must leave the question to the political branches.").

We have consistently held, however, that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security. In this vein, we have distinguished between claims requiring us to decide whether taking military action was "wise"—"a 'policy choice[] and value determination[] constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch'"—and claims "[p]resenting purely legal issues" such as whether the government had legal authority to act. *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring) (quoting *Japan Whaling*, 478 U.S. at 230). Accordingly, we have declined to adjudicate claims seeking only a "determination[] whether the alleged conduct *should* have occurred." *Harbury v. Hayden*, 522 F.3d 413, 420 (D.C. Cir. 2008). Despite some sweeping assertions to the contrary, *see, e.g.*, *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1264 (D.C. Cir. 2006) ("Whatever Kissinger did as National Security Advisor or Secretary of State can hardly be

called anything other than foreign policy [unreviewable under the political question doctrine]." (internal quotation marks omitted)), the presence of a political question in these cases turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action. *See Campbell*, 203 F.3d at 40 (Tatel, J., concurring).

The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion. A plaintiff may not, for instance, clear the political question bar simply by "recasting [such] foreign policy and national security questions in tort terms." *Schneider*, 412 F.3d at 197 (explaining the courts could not determine whether taking military action was "wrongful" as an element of a wrongful death claim). Likewise—and contrary to the position adopted by Judge Kavanaugh—a statute providing for judicial review does not override Article III's requirement that federal courts refrain from deciding political questions. *See Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) ("Congress may not confer jurisdiction on Art. III federal courts . . . to resolve 'political questions,' because suits of this character are inconsistent with the judicial function under Art. III." (internal citation omitted)); *cf. Gilligan*, 413 U.S. at 8–9 (stating a circuit judge "correctly read *Baker v. Carr*" when he wrote that "simply order[ing] compliance with the standards set by Congress" could "draw the courts into a nonjusticiable political question, over which we have no jurisdiction" (quoting *Morgan v. Rhodes*, 456 F.2d 608, 619 (6th

Cir. 1972) (Celebrezze, J., concurring in part and dissenting in part))); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (declining to construe a statute to require judicial review of foreign policy decisions "wholly confided by our Constitution to the political departments of the government, Executive and Legislative"); *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (citing *Waterman* for the proposition that "'[t]he judicial Power' created by Article III, § 1, of the Constitution is not *whatever* judges choose to do or even *whatever* Congress chooses to assign them" (citations omitted)). For example, in reviewing the Secretary of State's designation of a group as a "foreign terrorist organization" under the Antiterrorism and Effective Death Penalty Act, 8 U.S.C. § 1189 (2006), we may decide whether the government has followed the proper procedures, whether the organization is foreign, and whether it has engaged in terrorist activity, but we may not determine whether "the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States," *id.* § 1189(a)(1)(C). *See People's Mojahedin Org. of Iran v. U.S. Dep't of State (PMOI)*, 182 F.3d 17, 22–24 (D.C. Cir. 1999). Whether this last criterion has been met presents a nonjusticiable political question because the Secretary's assessments of whether the terrorist activities of foreign organizations constitute threats to the United States "are political judgments, 'decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'" *PMOI*, 182 F.3d at

23 (quoting *Waterman*, 333 U.S. at 111). Neither a common law nor statutory claim may require the court to reassess "policy choices and value determinations" the Constitution entrusts to the political branches alone. *Japan Whaling*, 478 U.S. at 230.

The conclusion that the strategic choices directing the nation's foreign affairs are constitutionally committed to the political branches reflects the institutional limitations of the judiciary and the lack of manageable standards to channel any judicial inquiry into these matters. *See generally Nixon*, 506 U.S. at 228–29 ("[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."). We must decline to reconsider what are essentially policy choices because "[t]he Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Japan Whaling*, 478 U.S. at 230 (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981)). In military matters in particular, the courts lack the competence to assess the strategic decision to deploy force or to create standards to determine whether the use of force was justified or well-founded.

> The complex, subtle, and professional decisions as to the . . . control of a military force are essentially

> professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.

Gilligan, 413 U.S. at 10. It is not the role of judges to second-guess, with the benefit of hindsight, another branch's determination that the interests of the United States call for military action.

The case at hand involves the decision to launch a military strike abroad. Conducting the "discriminating analysis of the particular question posed" by the claims the plaintiffs press on appeal, *Baker*, 369 U.S. at 211, we conclude that both raise nonjusticiable political questions. The law-of-nations claim asks the court to decide whether the United States' attack on the plant was "mistaken and not justified." Compl. at 30. The defamation claim similarly requires us to determine the factual validity of the government's stated reasons for the strike. If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target, and the plaintiffs ask us to do just that. Therefore, we affirm the district court's dismissal of the plaintiffs' law-of-nations and defamation claims.

A.

The plaintiffs' complaint asserts that customary international law requires states to compensate foreign nationals for property destruction that is "mistaken and not justified." The United States purportedly violated this norm when the CIA denied

the plaintiffs' request for compensation for the destruction of the plant. *See id.* at 29–30. Because we hold this claim barred by the political question doctrine, we need not decide whether customary international law requires compensation in these circumstances, or, if so, whether the plaintiffs have adequately stated a federal cause of action. *See generally Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

We begin our analysis with the rule we have already identified and upon which both parties agree: courts cannot reconsider the wisdom of discretionary foreign policy decisions. *See* Appellants' *En Banc* Br. at 22. The plaintiffs' law-of-nations claim falls squarely within this prohibition because it would require us to declare that the bombing of the El-Shifa plant was "mistaken and not justified." Whether an attack on a foreign target is justified—that is whether it is warranted or well-grounded—is a quintessential "policy choice[] and value determination[] constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling*, 478 U.S. at 230. The plaintiffs appear to recognize this. On appeal they imply that they need only prove the United States failed to compensate them for an attack that was "mistaken." *See* Appellants' *En Banc* Br. at 49–54 & n.6; *see also id.* at 53 (conceding that "whether the attack was reasonable and justified when it occurred" presents a "nonjusticiable question"). By asserting the El-Shifa bombing was "mistaken," the plaintiffs apparently mean that the United States would not have launched the strike if the relevant decisionmakers knew at the time what they allegedly know now—that the plant was neither

involved in producing chemical weapons nor associated with bin Laden. *See id.* at 9 (describing the plant as "targeted in error"); *id.* at 14 (arguing the bombing was mistaken because "evidence [has] emerged that the plant was in fact innocent property"). But the political question doctrine does not permit us to mimic the constitutional role of the political branches by guessing how they would have conducted the nation's foreign policy had they been better informed. Whether the circumstances warrant a military attack on a foreign target is a "substantive political judgment[] entrusted expressly to the coordinate branches of government," *Gilligan*, 413 U.S. at 11, and using a judicial forum to reconsider its wisdom would be anathema to the separation of powers. Undertaking a counterfactual inquiry into how the political branches would have exercised their discretion had they known the facts alleged in the plaintiffs' complaint would be to make a political judgment, not a legal one.

Moreover, *Baker*'s prudential considerations counsel judicial restraint as well. First, the court lacks judicially manageable standards to adjudicate whether the attack on the El-Shifa plant was "mistaken and not justified." *See Baker*, 369 U.S. at 217; *cf. Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490–91 (1999) (explaining the courts are "ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of the government's "reasons for deeming nationals of a particular country a special threat"). We could not decide this question without first fashioning out of whole cloth some standard for when military action is justified. The judiciary lacks the capacity for such a task. As we once said of a claim

that certain covert operations were "wrongful," "There are no [judicially] discoverable and manageable standards for the resolution of such a claim." *Schneider*, 412 F.3d at 197; *see also id.* ("To determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking."). Second, the decision to take military action is a "policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Such foreign policy decisions are "delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility . . . ." *Waterman*, 333 U.S. at 111. In short, the decision to launch the military attack on the El-Shifa plant was constitutionally committed to the political branches, *see, e.g.*, U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 1; *see also Schneider*, 412 F.3d at 194–95, and this court is neither an effective nor appropriate forum for reweighing its merits. *See Harbury*, 522 F.3d at 420. Because the plaintiffs' law-of-nations claim requires the court to second-guess that decision, we conclude that it presents a nonjusticiable political question.

Indeed, the law-of-nations claim suffers from flaws similar to those the Federal Circuit identified in the plaintiffs' previous claim that the bombing was a taking because it was mistaken. As the Federal Circuit explained, "In essence . . . the [plaintiffs] are contending that the President failed to assure himself with a sufficient degree of certainty" of the factual basis for his decision to strike the plant. *El- Shifa*, 378 F.3d at 1365. The plaintiffs would have the federal courts "provide them with an opportunity to test that contention, and in the process, require this

court to elucidate the . . . standards that are to guide a President when he evaluates the veracity of military intelligence." *Id.* This we cannot do.

In refusing to declare the El-Shifa attack "mistaken and not justified," we do not mean to imply that the contrary is true. We simply decline to answer a question outside the scope of our authority. By requiring that we reserve judgment, the political question doctrine protects the Congress and the Executive from judicial "invasion of their sphere," *Antolok v. United States*, 873 F.2d 369, 383 (D.C. Cir. 1989) (opinion of Sentelle, J.), and guards against "the reputation of the Judicial Branch [being] 'borrowed by the political Branches to cloak their work in the neutral colors of judicial action,'" *PMOI*, 182 F.3d at 25 (quoting *Mistretta v. United States*, 488 U.S. 361, 407 (1989)).

B.

The plaintiffs also claim that anonymous government officials defamed them by making statements linking them to bin Laden and international terrorism. This claim fares no better than their law-of-nations claim. It too would require the court to reconsider the merits of the decision to strike the El- Shifa plant by determining whether the government's justifications for the attack were false. *See* RESTATEMENT (SECOND) OF TORTS § 558(a) (1977).

We begin by noting that the court cannot judge the veracity of the President's initial public explanations for the attack for the same reasons we cannot examine whether the attack was "mistaken and not justified." The President's statements justifying the attack are "inextricably intertwined" with a foreign policy decision constitutionally committed to the

political branches, *Bancoult*, 445 F.3d at 436, because determining whether the President's statements were true would require a determination "whether the alleged conduct *should* have occurred," *Harbury*, 522 F.3d at 420. A decision in favor of the plaintiffs would unavoidably involve a rejection of the Clinton Administration's stated justifications for launching the missile strike. A decision against the plaintiffs would affirm the wisdom of the Administration's decision to attack.

The plaintiffs maintain, however, that even if the political question doctrine bars review of the President's initial justifications for the attack, the court may nevertheless judge the veracity of the subsequent justifications, which, they allege, offer different explanations for the strike. These allegedly defamatory statements are reviewable, the plaintiffs contend, because they do not state "the *actual* justification for the decision to attack the plant." Appellants' *En Banc* Reply Br. at 3. Rather, the plaintiffs allege that these statements are "*post hoc* pretext"—defamatory efforts at political damage control. *Id.*; *see also* Compl. at 1 (stating the action arises out of "false and defamatory statements made by United States government officials seeking to justify" the destruction of the plant); Compl. at 21–22 (alleging "government officials continued to justify their actions with statements intended to suggest that Mr. Idris was, in fact, associated with terrorism."). According to the plaintiffs, we can review these later justifications for the attack because they bear no relation to the President's initial justifications—that the plant was associated with bin Laden and involved in producing chemical weapons.

We disagree. The allegedly defamatory statements cannot be severed from the initial justifications for the attack. The court cannot adjudicate the truth of the government's later justifications because, despite the plaintiffs' arguments to the contrary, they are fundamentally the same as the initial justifications. In reaching this conclusion, we need look no further than the plaintiffs' complaint. Taking all of its allegations as true, we find no material difference between the allegedly defamatory statements and the President's contemporaneous explanation of his decision to take military action. On the day the United States destroyed the El-Shifa plant, President Clinton told the American people that he ordered the strike in part because the plant was "associated with the bin Laden network" and was a "chemical weapons-related facility." Compl. at 7, 13; *see also* Address to the Nation, 2 PUB. PAPERS at 1461; President William J. Clinton, Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460, 1460 (Aug. 20, 1998). In their prayer for relief, the plaintiffs describe the allegedly defamatory statements as "claims . . . that Mr. Idris or El-Shifa are [sic] connected to Osama bin Laden, terrorist groups or the production of chemical weapons." Compl. at 31; *see also id.* at 19 (detailing "numerous statements to news reporters falsely describing Salah Idris as an associate of Osama bin Laden and international terrorist organizations"). This characterization of the allegedly defamatory statements closely tracks the President's own description of his reasons for launching the attack.

All of the allegedly defamatory statements essentially repeat the President's initial justification

for the strike. Each describes a connection between bin Laden and the plant through its owner, Salah Idris. For example, "U.S. intelligence officials" stated Idris dealt financially with members of Islamic Jihad, which had been "absorbed into [bin Laden's] terror network." *Id.* at 20. And government officials claimed "the owner and manager of the plant were . . . front men for bin Laden." *Id.*; *see also id.* at 19 (citing a "Washington official" describing Idris as "a partner with bin Laden in other Sudanese businesses"); *id.* at 19–20 (quoting "one official" asserting that Idris "may have"purchased the El-Shifa plant "on bin Laden's behalf" and "that he's involved in money laundering, that he's involved in representing a lot of bin Laden's interests in Sudan"). Contrary to the plaintiffs' contentions, these statements do not represent a break from the President's contemporaneous explanation of his reasons for launching the strike. At most, they elaborate upon the nature of the connection between the plant and bin Laden—a connection the President offered on the day of the attack as one reason for taking military action. Declaring these later statements true or false would require us to make the same judgment about the President's initial justification for the attack.

The plaintiffs contend that Idris's alleged ties to bin Laden—the factual issue at the heart of their defamation claim—could not have played any part in the decision to bomb the plant because, at the time of the strike, the United States thought the plant was owned by the Sudanese government and not by Idris. Therefore, they argue, the court could declare the government's allegations that Idris was connected to bin Laden false without undermining the government's actual justifications for the attack. *See*

Appellants' *En Banc* Br. at 25; Appellants' *En Banc* Reply Br. at 2–3. To be sure, at least one anonymous official had previously suggested the plant belonged to the Sudanese Military Industrial Complex. *See* Compl. at 13. But this is beside the point. As the plaintiffs conceded before the *en banc* court, "[T]he owner of the plant was immaterial to [President Clinton's] decision to attack the plant." Oral Arg. Recording at 11:48–:51. The President explained that the United States targeted the plant because it was associated with bin Laden, and officials continued to assert that same rationale when they told reporters the plant's owner was financially linked to bin Laden's network. A court's pronouncement that the plant's owner had no financial ties to bin Laden would directly contradict the government's justification for the attack by disclaiming the asserted association between the plant and the bin Laden network.

The plaintiffs further argue that the political question doctrine does not block their defamation claim because "*by the government's own admission*, the accusations challenged as defamatory formed no part of the decision to attack the plant." Appellants' *En Banc* Br. at 24 (emphasis added). But none of the statements quoted in the complaint imply such an admission. The plaintiffs rely on one statement, which referenced "[n]ew evidence obtained since the attack." *See id.* at 24–25 (quoting Compl. at 19). The rest of the statement, however, makes clear that their reliance is misplaced: "New evidence obtained since the attack, one official said . . . , starts to make the link between the plant's current owner, Salaheldin Idris, and bin Laden 'more direct.'" Compl. at 19. The official's assertion that new evidence made

the connection between bin Laden and Idris "more direct" does not give rise to an inference, as the plaintiffs suggest, that there was no prior evidence of such a nexus. Indeed, the statement of another anonymous official quoted in the complaint suggests that the newer evidence merely corroborated the evidence existing at the time of the attack. *See id.* at 20 (quoting an anonymous official's statement that intelligence collected after the strike "*increasingly* points to ties with (Osama) bin Laden" (emphasis added)). This emphasizes that the veracity of the allegedly defamatory statements is "inextricably intertwined," *Bancoult*, 445 F.3d at 436, with the merits of the actual justifications for the attack and underscores the nonjusticiability of the plaintiffs' defamation claim.

C.

We conclude our political question analysis by addressing the plaintiffs' argument that they are asking nothing more than that we review the government's designation of them as supporters of the nation's enemies, something courts have done in other contexts. *See* Appellants' *En Banc* Br. at 23–30. This argument fails.

The plaintiffs point first to cases permitting judicial review of the enemy status of persons detained after being seized by the U.S. military on the battlefield. *See, e.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008). But the political question doctrine does not preclude judicial review of prolonged Executive detention predicated on an enemy combatant determination because the Constitution specifically contemplates a judicial role in this area. *See*

Boumediene, 128 S. Ct. at 2247 ("The [Suspension] Clause protects the rights of the detained by affirming *the duty and authority of the Judiciary* to call the jailer to account." (emphasis added)); *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (discussing the courts' "time-honored and constitutionally mandated roles of reviewing and resolving claims" of citizens challenging their military detention). The plaintiffs can point to no comparable constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target. *Cf. Bancoult*, 445 F.3d at 437 ("[W]hile the presence of constitutionally-protected liberties could require us to address limits on the foreign policy and national security powers assigned to the political branches, no such constitutional claims are at issue in this case.").

The plaintiffs also point to another line of cases in which courts have reviewed Executive Branch determinations that a certain asset is "enemy property" or belongs to a terrorist organization and therefore is eligible for seizure pursuant to statute. *See, e.g.*, *Chai v. Dep't of State*, 466 F.3d 125 (D.C. Cir. 2006); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003); *Von Zedtwitz v. Sutherland*, 26 F.2d 525 (D.C. Cir. 1928); *Bond v. United States*, 2 Ct. Cl. 529 (1866). These cases are not helpful to the plaintiffs for the same reasons the detainee cases are not. None required the courts to scrutinize a decision constitutionally committed wholly to the political branches. Indeed, the Supreme Court has suggested that judicial review of enemy-property designations made to effect statutorily authorized asset seizures is constitutionally mandated. *See Societe Internationale pour Participations Industrielles et*

Commerciales, S. A. v. Rogers, 357 U.S. 197, 210–11 (1958) ("[The] summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure."); *cf. Bancoult*, 445 F.3d at 435 ("[C]laims based on the most fundamental liberty and property rights of this country's citizenry, such as the Takings and Due Process Clauses of the Fifth Amendment, are justiciable, even if they implicate foreign policy decisions." (internal quotation marks and citations omitted)). No comparable constitutional commitment to the judiciary exists in this case. *See Paul v. Davis*, 424 U.S. 693, 701 (1976) (holding that defamation by the government, when it harms "reputation alone," does not constitute a deprivation of liberty or property under the Due Process Clause). The plaintiffs do not ask whether the government's conduct was prohibited by the Constitution. Instead, they seek declarations that the President should not have launched a military strike that the plaintiffs deem unwise and ill founded, and an injunction requiring the government to retract its justifications for the attack. The Constitution denies the courts the ability to grant such extraordinary relief.

III.

Our colleagues agree that the district court lacked jurisdiction but would affirm on a different ground. Their proposed alternative relies on the rule that federal courts lack jurisdiction to hear legally "insubstantial" claims. The Supreme Court and this

court have applied this rule narrowly, setting a high bar for dismissal that plaintiffs' claims do not meet.

"Dismissal for lack of subject-matter jurisdiction because of the inadequacy of [a] federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (internal quotation marks omitted). *But see, e.g.*, *Rosado v. Wyman*, 397 U.S. 397, 404 (1970) (characterizing this doctrine as "more ancient than analytically sound"). This ground for jurisdictional dismissal "is, as a general matter, reserved for complaints resting on truly fanciful *factual* allegations," *Best v. Kelly*, 39 F.3d 328, 331 n.5 (D.C. Cir. 1994), but also has some limited application to claims resting on insubstantial legal theories.

> [L]egal claims may be so insubstantial as to deprive federal courts of jurisdiction if "prior decisions inescapably render the claims frivolous." *Hagans* [*v. Lavine*, 415 U.S. 528, 538 (1974)]. That said, "previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial." *Id.* Thus, to qualify as insubstantial, a claim's "unsoundness [must] so clearly result[] from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex parte Poresky*, 290 U.S. 30, 32 (1933) (internal quotation marks omitted).

Ord v. District of Columbia, 587 F.3d 1136, 1144 (D.C. Cir. 2009) (some alterations in original).

Plaintiffs' claims are not so unsound as to warrant dismissal on this jurisdictional ground. There is "room for the inference that the question[s] sought to be raised can be the subject of controversy." *Poresky*, 290 U.S. at 32; *see, e.g.*, *El- Shifa*, 559 F.3d at 591–92 (Ginsburg, J., dissenting) ("Some of our cases do imply a plaintiff may obtain a retraction from the United States for defamation by one of its officers. . . . Federal rather than D.C. common law likely governs Idris's claim . . . ."). Perhaps the district court would have dismissed plaintiffs' claims for failure to state a claim under Rule 12(b)(6) had the case proceeded to the merits. But whether a claim is so insubstantial as to deprive the federal courts of jurisdiction is a "separate question from whether a complaint is subject to dismissal under Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim on which relief may be granted." *Ord*, 587 F.3d at 1144. The cases relied upon by the concurrence might "render [plaintiffs'] claims of doubtful or questionable merit," but they do not "foreclose the subject" and therefore "do not render them insubstantial." *Id.* at 1144 (quoting *Hagans*, 415 U.S. at 538, and *Poresky*, 290 U.S. at 32). "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946).

IV.

Our concurring colleagues charge the court with "*sub silentio* expand[ing] executive power." Concurring Op. of Judge Ginsburg at 3 (quoting Concurring Op. of Judge Kavanaugh at 11). To the contrary, it is they who would work a *sub silentio*

expansion. By asserting the authority to decide questions the Constitution reserves to Congress and the Executive, some would expand judicial power at the expense of the democratically elected branches. And by stretching beyond all precedent the limited category of claims so frivolous as not to involve a federal question, all would permit courts to decide the merits of disputes under the guise of a jurisdictional holding while sidestepping obstacles that are truly jurisdictional.

Straightforward application of our precedent makes clear that the plaintiffs face such an obstacle here. Under the political question doctrine, the foreign target of a military strike cannot challenge in court the wisdom of retaliatory military action taken by the United States. Despite their efforts to characterize the case differently, that is just what the plaintiffs have asked us to do. The district court's dismissal of their claims is

Affirmed.

GINSBURG, *Circuit Judge*, with whom *Circuit Judge* ROGERS joins, concurring in the judgment: I join Part I of Judge Kavanaugh's opinion concurring in the judgment because the plaintiffs have not alleged a non-frivolous cause of action; I write separately to make an additional point about the opinion for the Court. That opinion expands the political question doctrine well beyond the bounds delineated in *Baker v. Carr*, 369 U.S. 186 (1962), and the Court's need to consider whether application of the political question doctrine in a statutory case threatens the separation of powers arises only because of that unwarranted expansion.

The Court today expands the political *question* doctrine by reading into several of our recent cases something of a new political *decision* doctrine. On that approach, we are first to identify some "conduct" or "decision" (the opinion alternates) constitutionally committed to the Executive and then to ask whether the plaintiff's "claim[] ... call[s] into question," "require[s] the court to reassess," or is "inextricably intertwined with" that Executive conduct or decision. Op. at 12, 13, 18. If so, then the claim is non-justiciable, regardless whether the court would actually have to decide a political question in order to resolve it.

The Court's approach departs sharply from that prescribed in *Baker v. Carr*, which calls for a "discriminating inquiry into the precise facts and posture of the particular case" in order to detect "a political question's presence," 369 U.S. at 217; unless there is such a question and it is "inextricable from the case at bar," *id.*, then we are to decide it, even if "our decision may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986); *see also Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring) ("Resolving the issue in this case would require us to decide not whether the air campaign was wise ... but whether the President possessed legal authority to conduct the military operation"). The innovation adopted by the Court contravenes the Supreme Court's teaching that "[t]he doctrine of which we treat is one of "political questions," not one of "political cases." *Baker*, 369 U.S. at 217.

If the Court today followed *Baker v. Carr*, then there would be no occasion to consider whether the

application of the political question doctrine in a statutory case threatens the separation of powers by, as Judge Kavanaugh says, "systematically favor[ing] the Executive Branch over the Legislative Branch," Op. at 10. Under *Baker v. Carr* a statutory case generally does not present a non-justiciable political question because "the interpretation of legislation is a 'recurring and accepted task for the federal courts.'" *Id.* at 9 (quoting *Japan Whaling*, 478 U.S. at 230). For rare exceptions in which a statute called for a decision constitutionally committed to the President and hence not subject to judicial review, see *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), and *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) ("Of the three findings mandated by [the Statute, Secretary of State's finding that an organization's terrorist activity threatens national security] ... is nonjusticiable").

Under the Court's new political decision doctrine, however, even a straightforward statutory case, presenting a purely legal question, is non-justiciable if deciding it could merely reflect adversely upon a decision constitutionally committed to the President. *Compare, e.g., Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1234-35 (2009) (Edwards, J., concurring) ("The Secretary's first argument — that Zivotofsky's claim is a nonjusticiable political question — is specious.... These questions involve commonplace issues of statutory and constitutional interpretation, and they are plainly matters for the court to decide.") *with id.* at 1232 (Griffith, J., for the court) (plaintiff "invites the courts to call into question the President's exercise of the recognition power. This we cannot do. We therefore hold [his statutory] claim presents a

nonjusticiable political question because it trenches upon the President's constitutionally committed recognition power."). As Judge Kavanaugh notes, such a holding "*sub silentio* expand[s] executive power [at the expense of the legislature]." Op. at 11. The result of staying the judicial hand is to upset rather than to preserve the constitutional allocation of powers between the executive and the legislature.

KAVANAUGH, *Circuit Judge*, with whom *Chief Judge* SENTELLE joins, and with whom *Circuit Judges* GINSBURG and ROGERS join as to Part I, concurring in the judgment:

In August 1998, President Clinton ordered the U.S. military to bomb both the El-Shifa factory in Sudan and al Qaeda training camps in Afghanistan. The goals were to kill leaders of al Qaeda and to destroy al Qaeda infrastructure. President Clinton explained to Congress and the American people that he ordered the bombings in furtherance of the Nation's "inherent right of self-defense" in the wake of al Qaeda attacks on U.S. property and personnel in Kenya and Tanzania. As authority for the bombings, President Clinton cited his Commander-in-Chief power under Article II of the Constitution.

Plaintiffs El-Shifa Pharmaceutical Industries Company and its owner, Salah Idris, allege that their factory in Sudan was wrongly destroyed in the bombings and that they were reputationally harmed by later Executive Branch statements linking them to Osama bin Laden. As relevant here, they have brought a federal defamation claim and an Alien Tort Statute claim against the United States.

The Government correctly contends that plaintiffs have not alleged a cognizable cause of action; indeed,

plaintiffs have not come close. Plaintiffs' complaint should be dismissed on that basis alone, as Part I of this opinion explains. But the majority opinion instead relies on the political question doctrine to dismiss the complaint. I disagree with the majority opinion's political question analysis, as Part II of this opinion spells out.

I

Federal courts lack subject matter jurisdiction over claims that are "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (internal quotation marks omitted). Plaintiffs' two claims in this case fall into that category.

El-Shifa Pharmaceutical Industries Company operated a factory in Sudan that was bombed in August 1998 by the United States military, at the specific direction of President Clinton. In later press reports, anonymous U.S. Government officials were quoted as linking El-Shifa and its owner, Idris, to Osama bin Laden. El-Shifa and Salah Idris then sued the United States, advancing two claims of relevance here. First, to obtain relief for the allegedly false statements by Government officials that had linked plaintiffs to bin Laden, plaintiffs raised a federal defamation claim against the United States. The problem for plaintiffs is that there is no federal cause of action for defamation available against the United States. Second, plaintiffs claimed that the failure of the United States to compensate them for the allegedly mistaken bombing and destruction of their property violated a customary

international law norm recognized under the Alien Tort Statute, 28 U.S.C. § 1350. But plaintiffs have cited no customary international law norm that would require compensation by the United States under the Alien Tort Statute for mistaken war-time bombings.

A

First, plaintiffs assert a federal defamation claim against the United States. There is no such cause of action.

Congress has enacted a number of causes of action that can be brought against the United States or against Government officials for acts taken in their official capacities. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*; Federal Tort Claims Act, 28 U.S.C. § 1346; Westfall Act, 28 U.S.C. § 2679; Tucker Act, 28 U.S.C § 1491, 28 U.S.C. § 1346(a)(2). But Congress has not created a defamation cause of action against the United States.

Moreover, the Supreme Court has never recognized a federal common-law defamation cause of action against the United States. Indeed, the Court has not endorsed any federal common-law causes of action against the Government during the post-*Erie* period. And the Court several times has expressly declined to do so, noting that creation of new causes of action is a function typically best left to Congress. *See, e.g.*, *U.S. Postal Serv. v. Flamingo Indus.*, 540 U.S. 736, 744-45 (2004); *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994); *FDIC v. Meyer*, 510 U.S. 471, 483-86 (1994); *United States v. California*, 507 U.S. 746, 759-60 (1993); *United States v. Standard Oil Co.*, 332 U.S. 301, 313-16 (1947).

Plaintiffs cite three cases from this Court to support their argument that there is a federal common-law cause of action for defamation available against the United States. *See U.S. Info. Agency v. Krc*, 989 F.2d 1211, 1216 (D.C. Cir. 1993); *Cmty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987); *Expeditions Unlimited Aquatic Enters. v. Smithsonian Inst.*, 566 F.2d 289, 294 n.16 (D.C. Cir. 1977) (en banc). But none of those decisions holds that there is such a federal common-law cause of action.

In this Court, plaintiffs also attempt to argue that the Administrative Procedure Act supplies a cause of action for defamation. But that, too, is wrong; the APA contains no cause of action for defamation. Moreover, plaintiffs cannot use the APA – which, as relevant here, prohibits executive action that is "not in accordance with law" – to vindicate a purported federal common-law right that does not exist. 5 U.S.C. § 706(2)(a); *see also Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 245 (D.C. Cir. 1981).

In addition to a *federal* common-law cause of action, plaintiffs might also be alleging a purported *state* common-law cause of action against the United States, although their complaint never quite says as much. Even so, any such state-law cause of action may not be brought against the United States absent congressional authorization to that effect. *Cf. Tarble's Case*, 80 U.S. 397, 406 (1871); *Barr v. Matteo*, 360 U.S. 564, 569-71 (1959) (federal officers acting in their official capacities have immunity from suit, including against state-law defamation suits). In our constitutional system, the states do not regulate the Federal Government, either directly or

through state tort law, at least absent congressional consent. U.S. CONST. art. VI, cl. 2. The FTCA and Westfall Act do expressly borrow (or permit) state tort causes of action against the United States in certain carefully defined circumstances. But those statutes do not apply here, as plaintiffs concede. And contrary to plaintiffs' inventive arguments, the APA does not borrow state law or permit state law to be used as a basis for seeking injunctive or declaratory relief against the United States. As counsel for the Government succinctly and correctly stated at oral argument: "State tort law doesn't run against the United States, so it's not a federal law that can be pointed to as a substantive law which is being transgressed for an APA cause of action." Tr. of Oral Arg. at 52; *see In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 255 (5th Cir. 2006).[1]

B

Plaintiffs also seek a declaration that the United States violated customary international law, as cognizable under the Alien Tort Statute, 28 U.S.C. § 1350, because the United States failed to compensate plaintiffs for the allegedly mistaken destruction of their property.

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[1] Plaintiffs have not contended that the relevant agency actions were arbitrary and capricious under the APA. Even if they had, they would face a variety of hurdles – including 5 U.S.C. § 701(a)(2), which exempts from APA review agency action that is committed to agency discretion by law. Furthermore, any such APA claim would rest on the proposition that the statements of anonymous officials constitute final agency action. *See* 5 U.S.C. § 704. There is no support in our precedents for that conclusion.

The Alien Tort Statute, or ATS, authorizes suits brought "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The ATS covers "a relatively modest set of actions alleging violations of the law of nations" – including certain norms established as of 1789, which the Court identified as "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720, 724 (2004). The ATS may encompass other established customary international law norms so long as they do not have "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted" in 1789. *Id.* at 732.

Plaintiffs allege that the actions of the United States violated an established customary international law norm – namely, "the obligation of a government to compensate citizens of other nations for the mistaken destruction of their innocent property." El-Shifa Br. at 49 n.6. But plaintiffs cite no authority suggesting that the mistaken destruction of property during extraterritorial war-related activities – or denial of an administrative claim seeking compensation for the same – violates an established norm of customary international law. Furthermore, "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732-33. If the plaintiffs were correct, the federal courts presumably would be flooded with ATS claims – at a minimum, claims seeking declaratory relief for alleged violations of

customary international law norms – against the United States for allegedly mistaken property damage in every war, including the ongoing wars in Iraq and Afghanistan. Plaintiffs provide no persuasive reason for the federal judiciary to embark on such a novel and far-reaching endeavor in the absence of congressional direction.

In short, plaintiffs' attorneys have worked hard to find some basis in law for plaintiffs' complaint. But they have located no such basis: Plaintiffs' two claims are "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co.*, 523 U.S. at 89. The District Court's judgment dismissing plaintiffs' complaint should be affirmed for that reason alone.[2]

II

The straightforward approach outlined in Part I of this opinion would readily resolve this case. But the majority opinion instead relies on the notoriously "murky and unsettled" political question doctrine to dismiss the complaint. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (1984) (Bork, J., concurring). Because of the importance of the political question doctrine to the law of this Circuit, I believe it important to respond to the majority opinion and to explain my disagreement with its political question theory.

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[2] If a majority of the Court had been willing to dismiss plaintiffs' claims on this basis for lack of subject-matter jurisdiction, the Court could have avoided the need to confront the significant constitutional question whether plaintiffs' claims raise a nonjusticiable political question. *Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009).

The key point for purposes of my political question analysis is this: Plaintiffs do not allege that the Executive Branch violated the Constitution. Rather, plaintiffs allege that the Executive Branch violated congressionally enacted statutes that purportedly constrain the Executive. The Supreme Court has never applied the political question doctrine in cases involving statutory claims of this kind. As Judge Edwards has correctly explained, the proper separation of powers question in this sort of statutory case is whether the statute as applied infringes on the President's exclusive, preclusive authority under Article II of the Constitution. *See Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1240-45 (D.C. Cir. 2009) (Edwards, J., concurring). That is a weighty question – and one that must be confronted directly through careful analysis of Article II, not resolved *sub silentio* in favor of the Executive through use of the political question doctrine.

A

The political question doctrine has occupied a more limited place in the Supreme Court's jurisprudence than is sometimes assumed.[3] The Court has relied on

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[3] The Supreme Court does not decline to resolve a case on political question grounds simply because the dispute involves or would affect national security or foreign relations. Indeed, from the time of John Marshall to the present, the Court has decided many sensitive and controversial cases that had enormous national security or foreign policy ramifications. *See, e.g.*, *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008); *Medellín v. Texas*, 552 U.S. 491 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Kent v. Dulles*, 357 U.S. 116 (1958); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952);

the doctrine only twice in the last 50 years. *See Walter Nixon v. United States*, 506 U.S. 224 (1993); *Gilligan v. Morgan*, 413 U.S. 1 (1973). The Court has invoked the doctrine in cases in which (i) the Constitution textually and exclusively commits interpretation of the relevant constitutional provision to one or both of the political branches or (ii) the constitutional provision at issue supplies no judicially manageable or discoverable standards for resolving the case. *See Walter Nixon*, 506 U.S. at 228.

Importantly, the Supreme Court has invoked the political question doctrine only in cases alleging violations of the Constitution. This is a statutory case. The Supreme Court has never applied the political question doctrine in a case involving alleged *statutory* violations. Never.

As the Supreme Court has explained, the interpretation of legislation is a "recurring and accepted task for the federal courts." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Under Article III of the Constitution, "one of

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Johnson v. Eisentrager, 339 U.S. 763 (1950); *Korematsu v. United States*, 323 U.S. 214 (1944); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Ex parte Milligan*, 71 U.S. 2 (1866); *Prize Cases*, 67 U.S. 635 (1863); *Little v. Barreme*, 6 U.S. 170 (1804); *see also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 723 (2008) ("the Supreme Court's jurisprudence, stretching from early in our history through *Youngstown* to numerous contemporary war powers cases, is rife with instances of the Court's resolving questions of the Executive's war powers, just as it has adjudicated other separation of powers disputes between the political departments").

the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.*; *see also* 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3534.2, at 752 (3d ed. 2008) ("[I]nterpretation of statutes affecting foreign affairs is not likely to be barred by [the] political-question doctrine."); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 1.3. at 15 (5th ed. 2007) ("Under current law, the political question doctrine consigns certain allegations of *constitutional violations* to the other branches of government for adjudication and decision, even if all other jurisdictional and justiciability requirements are met.") (emphasis added).[4]

There is good reason the political question doctrine does not apply in cases alleging statutory violations. If a court refused to give effect to a statute that regulated Executive conduct, it necessarily would be holding that Congress is unable to constrain Executive conduct in the challenged sphere of action. As a result, the court would be ruling (at least implicitly) that the statute intrudes impermissibly on the Executive's prerogatives under Article II of the Constitution. In other words, the court would be establishing that the asserted Executive power is exclusive and preclusive, meaning that Congress

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[4] If a statute regulating private conduct provides no discernible standards and therefore insufficient notice of what actions are prohibited, the statute might be void for vagueness under the Due Process Clause. *See Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964). But that is not a political question doctrine determination.

cannot regulate or limit that power by creating a cause of action or otherwise.

Applying the political question doctrine in statutory cases thus would not reflect benign deference to the political branches. Rather, that approach would systematically favor the Executive Branch over the Legislative Branch – without the courts' acknowledging as much or grappling with the critical separation of powers and Article II issues. The fact that use of the political question doctrine in statutory cases loads the dice against the Legislative Branch presumably explains why there is no Supreme Court precedent applying the doctrine in statutory cases – and why the Executive Branch (sometimes wary, for a variety of reasons, of advancing a straight Article II argument) may want the courts to invoke the doctrine in statutory cases of this sort. *Cf.* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 723-24 (2008) ("One need only consider the cases that could arise in the contemporary setting to see that leaving the question of the President's constitutional authority to defy a statutory restriction on his war powers to the give-and-take of the political branches would be quite radical in its implications. . . . [T]he insistence that allocation of war powers should be 'left to politics' would hardly be a neutral solution to the problem: it would inevitably tilt the constitutional structure decidedly in favor of executive supremacy.").

In short, the question whether a statute intrudes on the Executive's exclusive, preclusive Article II authority must be confronted directly through careful

analysis of Article II – not answered by backdoor use of the political question doctrine, which may *sub silentio* expand executive power in an indirect, haphazard, and unprincipled manner. It is particularly important to confront the question directly because of the significance of such questions to our constitutional separation of powers. As Justice Jackson rightly explained, any claim of exclusive, preclusive Executive authority – particularly in the national security arena – "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

B

The approach suggested in this opinion is consistent with the results, if not all the reasoning, of this Court's recent cases declining to entertain certain tort suits in the national security arena. In those cases, as in this case, the plaintiffs asserted no cognizable cause of action. *See Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005). The Federal Tort Claims Act does not apply to suits for actions that occur in foreign countries or that encompass discretionary functions, among other exceptions. The Alien Tort Statute has never been held to cover suits against the United States or United States Government officials; the statute furnishes no waiver of sovereign immunity. And as we explained in *Harbury*, the Torture Victim Protection Act does not extend to suits against

American officials except in the unusual case where such an official acts "under color of foreign law."

The absence of a cause of action covering the national security activities at issue in *Harbury*, *Gonzalez-Vera*, *Bancoult*, *Schneider*, or this case is hardly surprising. The political branches, mindful of the need for Executive discretion and flexibility in national security and foreign affairs, are unlikely to unduly hamper the Executive's ability to protect the Nation's security and diplomatic objectives. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320-22 (1936). Relatedly, it is well-established that courts must be cautious about interpreting an ambiguous statute to constrain or interfere with the Executive Branch's conduct of national security or foreign policy. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988); *United States v. Johnson*, 481 U.S. 681, 690-91 (1987); *Haig v. Agee*, 453 U.S. 280, 292 (1981); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).[5] And apart from all that, if a statute were passed that clearly limited the kind of Executive national security or foreign policy activities at issue in these cases, such a statute as applied might well violate Article II. *Cf. Zivotofsky*, 571 F.3d at 1240-45 (Edwards, J., concurring).

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[5] In cases reviewing the Executive's designation of foreign terrorist organizations, we held that the statute left to the Executive Branch the determination whether a group threatened the security of the United States. *See People's Mojahedin v. Dep't of State*, 182 F.3d 17, 23-25 (D.C. Cir. 1999). This seems a straightforward application of *Dep't of the Navy v. Egan*'s principle of statutory interpretation, not any broad holding about the political question doctrine.

The main point here is that those issues should be confronted directly and carefully, not resolved *sub silentio* in favor of the Executive through invocation of the political question doctrine in a situation where the Supreme Court has never seen fit to employ it.

C

To say that the courts must directly confront the critical separation of powers and Article II issues posed by this kind of statutory case is not to say that the Executive lacks any exclusive, preclusive Article II authority. The Executive plainly possesses a significant degree of exclusive, preclusive Article II power in both the domestic and national security arenas. *See, e.g.*, *Ex parte Garland*, 71 U.S. 333, 380 (1867) (pardon power "of the President is not subject to legislative control.").

In the national security realm, although the topic is of course hotly debated, most acknowledge at least some areas of exclusive, preclusive Presidential power – where Congress cannot regulate and the Executive "wins" even in Justice Jackson's *Youngstown* Category Three. For example, courts have generally accepted that the President possesses exclusive, preclusive power under the Commander-in-Chief Clause of Article II to command troop movements during a congressionally authorized war. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 591-92 (2006) ("neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns") (quoting *Ex parte Milligan*, 71 U.S. 2, 139 (1866) (separate opinion of Chase, C.J.)).

This case involves President Clinton's unilateral decision to bomb suspected al Qaeda targets. In the wake of the August 1998 al Qaeda attacks on U.S. personnel and property in Tanzania and Kenya, President Clinton ordered these attacks "in exercise" of the United States' "inherent right of self-defense." Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1464 (Aug. 21, 1998). As authority for the bombings, President Clinton cited his Commander-in- Chief power under Article II.

A statute regulating or creating a cause of action to challenge the President's short-term bombing of foreign targets in the Nation's self-defense (or contesting the Executive Branch's subsequent statements about it as defamatory) might well unconstitutionally encroach on the President's exclusive, preclusive Article II authority as Commander in Chief. *Cf. Prize Cases*, 67 U.S. 635, 668 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."); 4A Op. Off. Legal Counsel 185 (1980).

But we need not definitively answer the sensitive and weighty Article II question in this case. As explained in Part I of this opinion, Congress has not created any cognizable cause of action that would apply to President Clinton's decision to bomb El-Shifa or later Executive Branch statements about the bombing. Indeed, the only remotely relevant statute in this case is the War Powers Resolution, which

seems to support the President's authority to conduct unilateral military operations for at least 62 days without specific congressional approval. *See* 50 U.S.C. § 1544(b).

Given that no cause of action exists here, the political question and Article II issues in this case have an abstract and hypothetical air to them. In these circumstances, we would be wise to heed Justice Jackson's cautionary words. We should decline the opportunity to expound on the scope of the President's exclusive, preclusive Commander-in-Chief authority under Article II. I respectfully disagree with the majority opinion's doing so – and particularly its doing so indirectly through reliance on the political question doctrine.

* * *

I would dismiss plaintiffs' complaint because plaintiffs' two claims are "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 7, 2008 Decided March 27, 2009

No. 07-5174

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY
AND
SALAH EL DIN AHMED MOHAMMED IDRIS,
APPELLANTS

v.

UNITED STATES OF AMERICA,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 01cv00731)

Christian G. Vergonis argued the cause for appellants. With him on the briefs were *Stephen J. Brogan*, *Timothy J. Finn*, and *Katherine E. Stern*.

C. Frederick Beckner III, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for appellee. With him on the brief were *Jeffrey S. Bucholtz*, Acting Assistant Attorney

General, *Jeffrey A. Taylor*, U.S. Attorney, and *Mark B. Stern* and *Dana J. Martin*, Attorneys.

Before: GINSBURG, HENDERSON, and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

Opinion concurring in the judgment in part and dissenting in part filed by *Circuit Judge* GINSBURG.

GRIFFITH, *Circuit Judge*: In 1998, the President of the United States ordered a missile strike against a pharmaceutical plant in Sudan that he believed was connected to the terrorist activities of Osama bin Laden. The owners of the plant sued the United States, challenging several allegedly defamatory statements made by senior executive branch officials justifying the strike as well as the government's failure to compensate them for the destruction of the plant. The district court dismissed plaintiffs' complaint, and we affirm on the ground that it presents a nonjusticiable political question.

I.

Because we are asked to review the grant of a motion to dismiss, we treat the factual allegations in the complaint as true. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). In August 1998, the terrorist network led by Osama bin Laden bombed American embassies in Kenya and Tanzania. Days later, the United States responded with a missile strike against a pharmaceutical plant in North Khartoum, Sudan, owned by plaintiffs El-Shifa Pharmaceutical Industries Company (El- Shifa) and Salah El Din Ahmed Mohammed Idris.

President Clinton justified the attack by publicly claiming that the El-Shifa plant was a "terrorists' base of operation" and "associated with the bin Laden network." Consistent with this claim, high-ranking executive branch officials also stated their belief that bin Laden financed the plant, which was owned by the Sudan Military Industrial Complex Corporation, made no commercial products, and, most ominously, was involved in the production of chemical weapons. To support this latter accusation, the officials pointed to a soil sample from the plant that included a chemical known as Oethylmethyl phosphonothioic acid, referred to as EMPTA, which is used in the manufacture of nerve gas.

Plaintiffs allege the Clinton Administration was wrong on all counts about its justifications for striking the plant. Neither bin Laden nor the Sudan Military Industrial Complex Corporation had ties to the plant, no chemical weapons agents such as EMPTA were ever present, and the plant produced only medicinal products, including over half the pharmaceuticals used in Sudan.

Once they learned that their initial justifications for the attack were false, Clinton Administration officials offered a new explanation that portrayed Idris, the actual owner of the plant, as a friend and supporter of terrorists. In particular, and as reported in several newspapers, anonymous executive branch officials claimed Idris was linked to bin Laden. The *Washington Post*, for example, reported "one official" as saying, "What we're learning about [Idris] leads us to suspect that he's involved in money laundering, that he's involved in representing a lot of bin Laden's interests in Sudan." Vernon Loeb & Bradley Graham,

Sudan Plant Was Probed Months Before Attack, WASH. POST, Sept. 1, 1998, at A14. According to plaintiffs, these statements were false.

Plaintiffs took several actions to recoup their losses from the attack. They first filed a lawsuit in the United States Court of Federal Claims seeking $50 million as just compensation under the Takings Clause of the Constitution. The court dismissed the suit as nonjusticiable under the political question doctrine and the United States Court of Appeals for the Federal Circuit affirmed. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1370 (Fed. Cir. 2004). Plaintiffs also filed an administrative claim with the Central Intelligence Agency (CIA) under the Federal Tort Claims Act (FTCA), seeking compensation for the destruction of the plant as well as a retraction of the allegedly defamatory statements about El-Shifa and Idris.

After the CIA denied the claim, plaintiffs filed this action against the United States under the FTCA seeking at least $50 million in damages for the government's alleged negligence and trespass in carrying out the attack. At issue on appeal are two further claims. The plaintiffs also sought declaratory judgments that the statements linking them to "Osama bin Laden, international terrorist organizations and the production of chemical weapons" were false and that the government's refusal to compensate them for the attack violated the law of nations. The district court granted the government's motion to dismiss plaintiffs' complaint for lack of subject matter jurisdiction, *see* FED. R. CIV. P. 12(b)(1), concluding that sovereign immunity barred all of plaintiffs' claims. *El-Shifa Pharm.*

Indus. Co. v. United States, 402 F. Supp. 2d 267, 270–73 (D.D.C. 2005). The court also noted that the complaint "likely present[ed] a nonjusticiable political question." *Id.* at 276. Plaintiffs filed a motion to alter the judgment with respect to their claims for equitable relief, which the district court denied. *El-Shifa Pharm. Indus. Co. v. United States*, No. 01-731 (D.D.C. Mar. 28, 2007).

On appeal, plaintiffs challenge only the dismissal of their claims for equitable relief for defamation and under the law of nations. They restrict their defamation claim to statements about Idris and their law of nations claim to the refusal to pay compensation for the attack. We have jurisdiction under 28 U.S.C. § 1291 (2000), and we review the district court's grant of the motion to dismiss de novo, *see Carter v. Wash. Metro. Area Transit Auth.*, 503 F.3d 143, 145 (D.C. Cir. 2007).

II.

The government urges us to affirm the district court's dismissal of this case on the ground that it presents a nonjusticiable political question. Because we affirm on this basis, we do not address the government's other arguments. *See Nemariam v. Fed. Democratic Republic of Eth.*, 491 F.3d 470, 481 (D.C. Cir. 2007).

Early in the nation's history, Chief Justice John Marshall, in seminal words that shaped the development of the political question doctrine, explained that the limited authority the Constitution grants to the judiciary to resolve disputes does not extend to all complaints about the actions of the Executive:

> The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803). In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court explained that the political question doctrine precludes courts from considering cases that involve

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. As *Baker*'s first factor indicates, the doctrine is "primarily a function of the separation of powers," *id.* at 210, and prohibits the judiciary from reviewing "policy choices and value determinations *constitutionally committed* for resolution to the halls of Congress or the confines of the Executive Branch,"

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (emphasis added).

Disputes involving national security and foreign policy decisions are "quintessential sources of political questions." *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006). The Constitution places these policy decisions in the hands of the President and Congress—not the judiciary. *See Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'— departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) ("[T]here could . . . be no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government."); *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 933–34 (D.C. Cir. 1988) (noting that "foreign policy decisions are the subject of . . . a textual commitment").

Even though "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211, the political question doctrine looms over plaintiffs' claims, this being a case that arises out of a decision to launch a military attack. We begin our analysis with a proposition upon which both parties agree: it is not for the federal courts to review the President's battlefield decisions. Appellee's Br. 18–21; Appellants' Reply Br. 2; *see Gilligan v. Morgan*, 413 U.S. 1, 10–11 (1973); *Bancoult*, 445 F.3d at 436;

Luftig v. McNamara, 373 F.2d 664, 665–66 (D.C. Cir. 1967) (per curiam). President Clinton, in his capacity as Commander-in- Chief, fired missiles at a target of his choosing to pursue a military objective he had determined was in the national interest. Under the Constitution, this decision is immune from judicial review. Although plaintiffs attempt to distance their law of nations and defamation claims from the nonjusticiable question of why the President ordered the missile strike, both claims nonetheless present questions "inextricably intertwined" with the underlying decision to attack the El- Shifa pharmaceutical plant. Plaintiffs' law of nations claim asserts that under customary international law a state must compensate a foreign national for the unjustified destruction of property. Plaintiffs allege the United States violated this principle by failing to compensate them for the destruction of their plant. In passing judgment on this claim, the district court could not avoid becoming arbiter of the President's battlefield actions and would need to determine whether his decision to bomb the plant was justified. *See* Appellants' Reply Br. 4 (acknowledging this issue "could require the Court to consider whether El-Shifa was, in fact, a chemical weapons facility").

This a court cannot do. We have consistently held that courts are not a forum for second-guessing the merits of foreign policy and national security decisions textually committed to the political branches. *See Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1263–64 (D.C. Cir. 2006) (dismissing a suit concerning alleged unlawful U.S. assistance to the Pinochet regime because the challenged actions "were 'inextricably intertwined with the underlying' foreign policy decisions constitutionally committed to the

political branches" (quoting *Bancoult*, 445 F.3d at 436)); *see also Harbury v. Hayden*, 522 F.3d 413, 420 (D.C. Cir. 2008) (dismissing a suit against American officials alleged to have unlawfully conspired with the Guatemalan army because it sought a "determination[] whether the alleged conduct *should* have occurred, which impermissibly would require examining the wisdom of the underlying policies"); *Bancoult*, 445 F.3d at 436 (dismissing a suit challenging the tactical measures allegedly taken in depopulating island territories to build a naval base because the measures were "inextricably intertwined" with an exercise of "the foreign policy and national security powers entrusted . . . to the political branches"); *Schneider*, 412 F.3d at 194–95 (dismissing a suit alleging that the United States assisted in the kidnapping, torture, and death of a Chilean general during the Cold War because it challenged a foreign policy decision textually committed to the political branches). This precedent controls our decision here. Plaintiffs' law of nations claim asks us to review whether the President was justified in striking the El- Shifa plant. Courts have no business hearing such claims.[1]

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[1] We disagree with our dissenting colleague's conclusion that the law of nations claim has been forfeited. *See* Dissenting Op. at 3. Plaintiffs fully brief the claim challenging the CIA's failure to compensate, which the district court also addressed, and so it must be addressed here. The dissent assumes that the law of nations claim replicates the abandoned claim that the attack was unjustified. That reasoning mistakenly conflates the concepts of claims and issues. The *claim* in the challenge to the attack was that plaintiffs were entitled to a declaratory judgment that the President was wrong to order the strike (Claim 1). That claim has been forfeited. The law of nations

Plaintiffs' defamation claim suffers from a similar flaw. The complaint plainly acknowledges that executive branch officials offered the allegedly defamatory statements in justification of the President's decision to attack the plant. Compl. ¶ 1 (stating the action arises out of "false and defamatory statements made by United States government officials seeking to justify [the destruction of the El-Shifa pharmaceutical plant]"); *id.* ¶ 64 (concluding that U.S. officials offered these statements as "a new justification for their attack"). Consider the review the district court would need to undertake in ruling on this claim. To prevail in their defamation suit, the plaintiffs must show that the statements made to justify the attack were false. *See generally* RESTATEMENT (SECOND) OF TORTS § 558 (1977). The district court, then, could not avoid the question whether Idris was in fact associated with bin Laden, meaning a judicial decision for the plaintiffs would

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claim is that plaintiffs are entitled to a declaratory judgment that the CIA wrongfully refused to compensate plaintiffs (Claim 2). An *issue* in Claim 2 is whether the President unjustifiably ordered the strike, for if the attack was justified no compensation was due. The question presented in Claim 1 is also an issue in Claim 2. The dissent wrongly concludes that because Claim 1 is forfeited and because it raises an issue in Claim 2, Claim 2 is also forfeited. Claim 1 challenged an action by the President, whose sovereign immunity is not waived by the Administrative Procedure Act (APA). By contrast, Claim 2 challenges the action of a federal agency whose sovereign immunity *is* waived by the APA, 5 U.S.C. § 702 (2006). Crucially, the relief requested in Claim 1 ran against the President, while in Claim 2 it runs against the CIA. Although judicial review of Claim 2 may require review of an issue presented in Claim 1, Claim 2 is not barred by sovereign immunity and is properly before us.

directly contradict the Clinton Administration's ultimate stated justification for launching the missile strike.

The dissent notes that this allegedly defamatory justification came after the plant was bombed and thus argues that the plaintiffs' claim would not call into question the President's true motivations for launching the missile strike. *See* Dissenting Op. at 6. But both Idris and the dissent admit that the challenged statements were offered in justification of the decision to bomb the plant. *See id.* at 8 (citing Compl. ¶¶ 63–64). We have no trouble concluding that the President's public justifications for discrete military action are always offered, in part at least, with strategic military, national security, or foreign policy objectives in mind. The making of such justifications is itself a policy decision that cannot be separated from the conduct of foreign relations and the exercise of the war power that it explains. *See* Appellee's Br. 15 ("[P]ublic statements about the bombing . . . are closely intertwined with the decision to launch the military strike.").[2] Accordingly, we conclude that a decision on the defamation claim would necessarily cross the barrier marked by the political question doctrine. *See Schneider*, 412 F.3d at 194 ("[T]here could . . . be no doubt that decision-

[2] According to the dissent, Idris can avoid dismissal here by stating that the President's justifications for the missile strike were made not in furtherance of national security or foreign policy, but merely to avoid public embarrassment. *See* Dissenting Op. at 7–8. Implicit in the dissent's argument on this point is a suggestion, which we reject, that plaintiffs can avoid the political question bar at the motion to dismiss stage by artful pleading that recasts the terms of a dispute to make it one properly reviewed by courts.

making in the fields of foreign policy and national security is textually committed to the political branches of government."); *cf. Wilson v. Libby*, 535 F.3d 697, 704 (D.C. Cir. 2008) (holding that the political question doctrine did not apply in a case involving "disclosures made by high-level executive branch officials when speaking with the press" because plaintiffs did not "challenge[] any foreign policy or national security decisions").[3]

The dissent responds by arguing that judicial review of the allegedly defamatory statements about Idris is no more of an intrusion upon the Executive's national security decisions than is judicial review of, for example, an enemy combatant determination, which the political question doctrine does not forbid. *See* Dissenting Op. at 9–11 (citing *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008); *Chai v. Dep't of State*, 466 F.3d 125 (D.C. Cir. 2006); *Von Zedtwitz v. Sutherland*, 26 F.2d 525 (D.C. Cir. 1928)). But none of the cases cited by the dissent involved a textual commitment of authority to the political branches. *Boumediene* found in the Suspension Clause a textual commitment to the judiciary of authority to review enemy combatant determinations resulting in prolonged detention. *See* 128 S. Ct. at 2247.

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[3] The dissent assumes that we find decisionmaking in these fields exclusively within the President's Commander-in-Chief authority. *See* Dissenting Op. at 9–11. We express no such opinion. Rather, we simply rest our holding on the proposition that the conduct of our foreign relations is committed to the political departments, "and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision," *Oetjen*, 246 U.S. at 302.

Likewise, in *Parhat*,[4] *Chai*,[5] and *Von Zedtwitz*,[6] we were not called upon to scrutinize decisions textually committed to a coordinate branch of government. In raising these cases, the dissent presents an interesting question concerning the boundary between decisions properly made by the judiciary and decisions constitutionally committed to the political branches. Fortunately, we need not decide where that boundary lies. Plaintiffs' defamation claim presents a challenge to the Executive's foreign policy and national security decisionmaking, two areas clearly outside our authority.

III.

We conclude that this case presents a nonjusticiable political question. The judgment of the district court dismissing plaintiffs' claims is

Affirmed.

GINSBURG, *Circuit Judge*, concurring in the judgment in part and dissenting in part: Salah El Din Ahmed Mohammed Idris and the El-Shifa

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[4] *Parhat*, 532 F.3d at 839 (citing the Detainee Treatment Act, section 1005(e)(2)(A) of which gives this court "exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant").

[5] *Chai*, 466 F.3d at 128–29 (citing 8 U.S.C. § 1189(c) (2006), which allows an entity designated as a terrorist organization under the Antiterrorism and Effective Death Penalty Act to seek judicial review in this court).

[6] *Von Zedtwitz*, 26 F.2d at 153–54 (citing the Trading with the Enemy Act, section 9(a) of which provides for judicial review of certain seizures of property).

Pharmaceutical Industries Company, which Idris allegedly owns, sued the United States following a missile strike against the Company's plant in Sudan. The plaintiffs advanced several claims, only two of which remain at issue in this appeal. The Court holds both claims must be dismissed because they raise questions constitutionally committed not to the judicial but to the political branches, the alternative ground raised by the Government in the district court.

I agree that the claim the United States violated the law of nations in striking the plant and failing to pay the plaintiffs compensation should be dismissed, but I do so because the plaintiffs did not preserve that claim; we therefore have no need to pass upon a constitutional issue. I believe the claim that various officers of the United States defamed Idris in the wake of the strike should be remanded to the district court for further proceedings; the complaint, which the Government has not yet answered, does not necessarily raise a political question and may be subject to objections that do not require us to reach the constitutional issue.

I. The Law of Nations Claim

The plaintiffs first allege the United States violated international law by "destroy[ing] the Plant without justification," Compl. ¶ 112, and by failing "to use peaceful means to resolve its . . . concerns," *id.* ¶ 113, in contravention of the prohibition on the use of force in the Charter of the United Nations, *id.* ¶ 109. The breach of this international obligation, they say, triggers the responsibility of the United States to compensate them. *Id.* ¶¶ 110–11. The plaintiffs accordingly seek "[a] declaration that the . . . attack

on the El- Shifa pharmaceutical plant violated the law of nations," which declaration they say would restore "the reputations of El-Shifa and Mr. Idris" by dispelling the "suspicion that they were engaged in the production of chemical weapons or other activities associated with terrorism," *id.* ¶¶ 115–16.

The district court dismissed the claim as barred by sovereign immunity, *see Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380 (1821) ("a sovereign independent State is not suable, except by its own consent"); *see also United States v. Lee*, 106 U.S. 196, 207–08 (1882), without reaching the Government's alternative argument for dismissal based upon the constitutional bar to judicial resolution of a political question. Although the plaintiffs sued only the United States, they invoked § 702 of the Administrative Procedures Act, which provides a waiver of immunity for any suit against the United States "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority," 5 U.S.C. § 702, regardless whether the suit is brought under the APA, *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006). The district court held the waiver in the APA inapplicable, however, because the plaintiffs' law of nations claim sought to impugn only the President's decision to strike the plant and the President is not an "agency" within the meaning of the APA. 402 F. Supp. 2d 267, 272–73 (2005); *see Dalton v. Specter*, 511 U.S. 462, 476–77 (1994).

On appeal, the plaintiffs do not take issue with the ruling that the waiver of sovereign immunity in § 702 is inapplicable insofar as they alleged the strike

against the El-Shifa plant violated international law. Their opening brief states frankly "Plaintiffs no longer seek a declaration that the destruction of the plant . . . violated international law." In that respect, therefore, their claim is waived and there is no need for the court to reach the constitutional question whether the claim is barred by the political question doctrine. *See Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 863 (D.C. Cir. 2008).

The plaintiffs do argue on appeal, however, as they did before the district court on motion to alter the judgment, that they were challenging not only the President's decision to strike the plant but also "the CIA's independent and final decision to deny compensation based on after-acquired evidence about the El-Shifa plant." The waiver of sovereign immunity in the APA does apply to this claim because the CIA clearly is an "agency."

The claim nonetheless must be dismissed because the complaint faults the Government for failing to compensate the plaintiffs only upon the premise "that the destruction of the Plant was . . . not justified under the law of nations." *See* Compl. ¶ 115. Having waived the argument that the strike against the plant violated the law of nations, the plaintiffs necessarily forfeited their challenge to the CIA's failure to compensate them.* Accordingly, we have

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* In a cryptic footnote the Court asserts I erroneously conclude the law of nations claim was forfeited by "conflat[ing] the concepts of claims and issues," Ct. op. at 8–9 n.1, but, as noted in the text, the complaint asserts the CIA violated international law by failing to pay the plaintiffs compensation only because the attack "was ... not justified under the law of nations," Compl. ¶ 115. Thus, the claim that the failure to pay compensation violated international law depends upon the

neither the need nor the occasion to address the Government's argument that the plaintiffs' law of nations claim raises a political question.

II. The Claim for Defamation

The second claim before us on appeal is that certain officers of the United States defamed Idris, giving rise to a "cause of action . . . against the United States . . . under both the common law . . . and the APA." It is worth repeating Idris's allegations because, as the Court notes, we must "treat the factual allegations in the complaint as true." Ct. op. at 2.

According to Idris: President Clinton and various government officials initially justified the attack to the public on the ground that the plant, which was owned by the Sudanese Government, was a "chemical weapons-related facility" involved in the manufacture of EMPTA, Compl. ¶ 27 ("In Sudan, they are . . . manufacturing nerve gas which could kill us all"), had no commercial purpose, *id.* ¶ 35, and enjoyed the suspicious protection of the Sudanese military, *id.* ¶ 39. Moreover, a "senior intelligence officer" reported on the day of the strike that Osama "bin Laden has made financial contributions to the Sudanese Military Industrial Complex . . . a distinct entity of which, we believe, the Shifa pharmaceutical facility is [a] part," *id.* ¶ 43. Thus, "[t]he U.S. officials who authorized the attack did not know" Idris "owned El-Shifa at the time of the attack." *Id.* ¶ 65. Within a few days after the strike, however, the press began to

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question whether the strike violated international law, which the plaintiffs have waived regardless whether it is characterized as a "claim" or as an "issue."

identify him as the owner of the plant, *id.* ¶ 66, and U.S. officials began to retract the public statements made initially in justification for the strike. "[R]ather than admit that a terrible mistake was made . . . U.S. officials . . . invent[ed] new justifications for" striking the El-Shifa plant. *Id.* ¶ 64. Officials claimed falsely and with reckless disregard for the truth that, among other things, (1) Idris is a financial supporter of the National Islamic Front; (2) "evidence obtained since the attack .... suggest[s] that Idris . . . purchased the plant . . . on bin Laden's behalf"; (3) Idris "represent[s] a lot of bin Laden's interests in Sudan"; and (4) Idris "has had financial dealings with members of Islamic Jihad" and "launders money for international Islamic groups." *Id.* ¶ 66. As with the law of nations claim, Idris sought declaratory relief and argued the APA provided the requisite waiver of sovereign immunity.

The district court dismissed the defamation claim because it erroneously read the complaint to seek damages, and therefore to be subject to the Federal Tort Claims Act, which does not waive sovereign immunity for claims of defamation seeking damages. 402 F. Supp. 2d at 272 (citing 28 U.S.C. § 2680(h)). In his motion to alter the judgment Idris pointed to the waiver in the APA for suits seeking declaratory relief, 5 U.S.C. § 702. The court denied the motion, again without reaching the Government's alternative argument that the case presented a political question, this time on the ground there had been no "final agency action," as required by § 704 of the APA. No. Civ.A. 01-731, 2007 WL 950082, at *1 (Mar. 28, 2007).

In ruling upon the motion, the district court again erred: First, the CIA had denied Idris's request for a retraction, which certainly seems to be final agency action. *See Yousuf v. Samantar*, 451 F.3d 248, 251 (D.C. Cir. 2006). In any event, "[t]he waiver [in § 702 of the APA] applies regardless of whether [the challenged conduct] constitutes 'final agency action.'" *Trudeau*, 456 F.3d at 187. Finally, the requirement of final agency action in 5 U.S.C. § 704 limits only causes of action arising under the APA itself, *id.* at 190–91; here Idris invoked both the APA and the common law of defamation.

Today the Court affirms the district court's erroneous dismissal of Idris's claim for defamation on the different but inapposite constitutional ground that the allegedly defamatory statements are "'inextricably intertwined' with the underlying decision to attack the El-Shifa pharmaceutical plant." Ct. op. at 7. The Court first asserts that Idris's "defamation claim suffers from a [flaw similar]" to that of his claim under international law. *Id.* at 9. The claim based upon international law, according to the Court, presents a political question because in adjudicating it, the district court "would need to determine whether [the President's] decision to bomb the plant was justified." *Id.* at 7. Apparently, however, the Court does not really — indeed, it could not reasonably — believe the district court, in adjudicating the defamation claim, would necessarily call into question the President's decision: Idris contends the CIA's statements came after and had nothing to do with the President's reason for bombing the plant. *See id.* at 2–3; BILL CLINTON, MY LIFE 805 (2004). Instead, the Court reasons that, even if Idris's claim "would not call into question the President's

true motivations for launching the missile strike," it is nevertheless barred by the political question doctrine because the CIA's *post hoc* justification may implicate other "strategic military, national security, or foreign policy objectives" of the President. Ct. op. at 10. In other words, the *post hoc* justification was itself a strategic military and foreign policy decision and therefore not subject to judicial review.

The Court, however, merely speculates that strategic objectives were served by the CIA's *post hoc* statements about Idris. For support the Court first musters the assertion that "public justifications for discrete military action are always offered, in part at least, with strategic ... objectives in mind." *Id.* If, however, the allegedly defamatory statements themselves furthered the President's conduct of military affairs, then surely the Government would explain how.

The Government offers no such explanation in support of its motion to dismiss and therefore I am at a loss to understand why the Court struggles to create one for it. In order to imply the Government has explained how the CIA's *post hoc* statements were strategic decisions, the Court quotes the assertion in the Government's brief — as though it were evidence — that "'public statements about the bombing [were] ... closely intertwined with the decision to launch the military strike.'" *Id.* Read in context, however, the Government's statement is not even an attempt to argue the CIA's *post hoc* justification was itself a strategic decision:

> As the Federal Circuit held in upholding the dismissal of plaintiffs' takings claim under the political question doctrine, the Constitution

> provides the courts with no authority to review the President's determination that the nation is "at risk of imminent attack" or his determination that private property overseas is enemy property that must be destroyed to "most effectively neutralize the possibility of attack." ... The result does not change here because plaintiffs have challenged not only the [President's] decision to bomb the El-Shifa plant, but also [the CIA's] public statements about the bombing that themselves are closely intertwined with the decision to launch the military strike.

Appellee's Br. at 14–15 (internal citation omitted). Thus, far from explaining that the CIA's *post hoc* statements were strategic decisions, the Government asserts only that a court cannot question the President's decision to bomb the plant merely because the issue arises in the context of a claim for defamation.

More important, in asserting the CIA had — or, more accurately, must have had — a strategic motivation, the Court refuses to accept as true Idris's allegations. According to Idris, "U.S. officials," facing "profoundly embarrassing" criticism from the press, simply invented a new justification for the attack "rather than admit ... a terrible mistake." Compl. ¶¶ 63–64. The Court labels this allegation "artful pleading" designed to "recast[] the terms of a dispute to make it one properly reviewed by courts." Ct. op. at 10 n.2. The Constitution does not, however, require us to ignore the rules governing a motion to dismiss simply because the Government has argued Idris's defamation claim presents a political question. Indeed, factual development often is necessary to

determine whether a suit presents a nonjusticiable political question. *See, e.g.*, *Zivotofsky ex rel. Ari Z. v. Sec'y of State*, 444 F.3d 614, 619-20 (D.C. Cir. 2006) (remanding to district court for it to develop facts related to whether suit presented political question). The Court can label Idris's allegation an "artful" attempt to circumvent the Constitution only because the Court assumes (a) the CIA must have had a strategic objective in mind and (b) any challenge to a strategic decision necessarily raises a political question, even if the decision was only "in part" motivated by military or foreign policy objectives, Ct. op. at 10.

In any event, the Court errs in believing Idris's claim necessarily raises a political question simply because it implicates a strategic decision. Apparently the Court believes the Constitution grants the Executive the unreviewable discretion to make defamatory statements even if they have nothing to do with the actual justification for a military decision because (or so the Court assumes) every public explanation of a military decision is "offered, in part at least, with strategic ... objectives in mind." *Id.* That proposition is not only novel and frightening, it ignores Supreme Court precedent.

To hold that Idris's claim for defamation *necessarily* raises a political question, it is not enough that resolving the suit might (or might not) implicate a military decision of the President — any more than review of the Executive's decision to detain a person as an enemy combatant might (or might not) reflect upon the military's decision to seize that person in the war zone, *see Boumediene v. Bush*, 128 S. Ct. 2229, 2262–74 (2008) (holding Detainee

Treatment Act of 2005 violates habeas corpus Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, an aspect of separation of powers, because DTA does not allow detainee to introduce "previously unavailable exculpatory evidence"). In addressing the issues raised by such a suit, a court is asked neither to resolve any question of policy, *cf.* Ct. op. at 6, nor to "conduct . . . the foreign relations of our government," *id.* (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)).

Although the Court states it does not "find decisionmaking in [the] fields [of foreign policy and national security] exclusively within the President's Commander-in-Chief authority," *id.* at 11 n.3, implicit in the Court's reasoning is the assumption that the Constitution bars the Congress from conferring upon Idris a cause of action to challenge the CIA's statements, *see, e.g., id.* at 12 ("Plaintiffs' defamation claim presents a challenge to the Executive's foreign policy and national security decisionmaking, two areas clearly outside our authority"). Here, Idris asserts the CIA had a duty under both the common law and an Act of Congress (the APA) not to spread false information about him; if he is correct, then he should be able to call upon the courts to provide him the statutory remedy he seeks, *see Baker v. Carr*, 369 U.S. 186, 211 (1962) ("it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"). It simply is not the case under our Constitution that the Congress has no role in regulating the armed forces, *see* U.S. CONST. art. I, § 8, cls. 11, 14; *cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749, 2786 (2006) (President's use of military commissions must comply with statutory

law) — let alone the CIA's use of defamatory statements — such that it may not impose upon the Executive a legal obligation for the breach of which an injured party will have a remedy at law. Idris may not be defeased of his right (if any there be), nor the judiciary ousted from its jurisdiction, solely because — as the Court would have it — the President "fired missiles at a target of his choosing," Ct. op. at 7.

For support the Court cites several cases in which plaintiffs have directly challenged military decisions of the President. *Id.* To be sure, a challenge to the President's decisions regarding the "training, weaponry and orders" of the military presents a political question. *Gilligan v. Morgan*, 413 U.S. 1, 4, 10 (1973) (internal quotation marks omitted) (dismissing suit challenging decision to send National Guard to quell civil disorder on college campus); *see Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006) (dismissing challenge to "specific tactical measures allegedly taken to depopulate" island and to construct military base there); *Luftig v. McNamara*, 373 F.2d 664, 665–66 (D.C. Cir. 1967) (dismissing suit seeking to bar deployment to Vietnam). In this case, however, Idris challenges the CIA's subsequent portrayal of him as a terrorist — and there is an equally clear line of cases in which we have heard, without constitutional qualms, an individual's statutory challenge to his designation as an enemy combatant, thereby supposedly "becoming arbiter of the President's battlefield actions," Ct. op. at 7. *See, e.g.*, *Parhat v. Gates*, 532 F.3d 834 (2008) (addressing statutory claim of wrongful detention, brought under Detainee Treatment Act); *Chai v. Dep't of State*, 466 F.3d 125 (2006) (addressing

statutory claim of wrongful designation as terrorist organization, brought under 8 U.S.C. § 1189); *Von Zedtwitz v. Sutherland*, 26 F.2d 525 (1928) (addressing statutory claim of wrongful seizure of property, brought under Trading with the Enemy Act). The Supreme Court has done the same. *See Boumediene*, 128 S. Ct. 2229.

The Court finds those cases inapposite because "none . . . involved a textual commitment of authority to the political branches," Ct. op. at 11; *see also id.* at 12, but that merely restates the Court's reason for concluding Idris's claim presents a political question. The Court nowhere explains why entertaining Idris's claim would intrude upon the President's exclusive authority as Commander-in-Chief under the Constitution any more than would hearing a claim of wrongful detention of a person or seizure of property during a war. If anything, I would have thought the decision to detain a person or to seize property is more closely tied to the conduct of war than the decision to label Idris a supporter of terrorists.

The Court believes *Parhat*, *Chai*, and *Von Zedtwitz* raise "an interesting question" it need not answer, namely, where lies "the boundary between decisions properly made by the judiciary and decisions constitutionally committed to the political branches." *Id.* at 12. The Court nonetheless determines that Idris's defamation claim lies on the far side of that boundary, beyond the reach of judicial review. Although the Court may insist Idris's claim for defamation is "clearly outside our authority," *id.*, it "does nothing more than assert that [his] action may affect the foreign relations of the United States[;] ... that is surely not enough" to determine whether the

claim for defamation actually and necessarily raises a political question. *Simon v. Iraq*, 529 F.3d 1187, 1197 (D.C. Cir. 2008).

* * *

Whether Idris is entitled to a trial on the merits of his claim for defamation is not clear at this stage of the litigation; the Government has not even filed its answer. Some of our cases do imply a plaintiff may obtain a retraction from the United States for defamation by one of its officers, *e.g.*, *Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst.*, 566 F.2d 289, 294 n.16 (1977) (en banc) (dictum stating that "[u]nder certain circumstances, declaratory and injunctive relief may be obtained against defamatory statements by government officials"); *see also Cmty. For Creative Non-Violence v. Pierce*, 814 F.2d 663, 671–73 (1987) (remanding claim of slander brought against federal officer under D.C. common law), but there are reasons to doubt Idris has a cause of action under the APA. For one, the conduct he challenges might be "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *cf. Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) (holding visa determinations are unreviewable under 5 U.S.C. § 701(a)(1) or § 702(1) and noting that no presumption of reviewability applies "[w]hen it comes to matters touching on national security or foreign affairs"). I would, however, leave it to the district court on remand to address this question in the first instance; the district court has not opined upon it and the parties have not briefed the question sufficiently in this court.

Nor is it obvious the common law would provide Idris a remedy. Federal rather than D.C. common

law likely governs Idris's claim because that claim implicates "the rights and obligations of the United States," *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); *see also Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), and under federal common law the United States may be immune from liability on the facts here alleged, *see Barr v. Matteo*, 360 U.S. 564, 575 (1959) (holding — prior to enactment of Westfall Act — executive officers enjoyed absolute immunity from liability for damages under common law of defamation if they acted within "outer perimeter" of their authority); *see also Boyle*, 487 U.S. 500; *see generally* ROBERT D. SACK, SACK ON DEFAMATION § 8.2 (3d ed. 1999). Alternatively, Idris's common law right may have been preempted by a statute or statutes that occupy the field. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–04 (1983) ("Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose" (internal quotation marks omitted)); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Boyle*, 487 U.S. 500.

* * *

As pleaded, Idris's claim does not call upon the district court to inquire in any way into the "President's true motivation" for the bombing, nor has the Government shown the claim implicates any other military objective. Still, I would not hold that the district court must entertain Idris's claim for defamation. I would hold only that, to the extent, if any, that Idris has stated a claim upon which relief may be granted, nothing in the constitutional allocation of authority between the political and the judicial branches requires that the Court dismiss it.

III. Conclusion

For the reasons stated in Part I above, and not for the reasons given by the Court, I concur in the judgment with respect to the plaintiffs' claim based upon the law of nations. For the reasons stated in Part II above, I respectfully dissent from the Court's disposition of Idris's claim for defamation.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 01-731 (RWR)

MEMORANDUM ORDER

Plaintiffs El-Shifa Pharmaceutical Industries Company ("El-Shifa"), a stock corporation located in Sudan, and Salah El Din Ahmed Mohammed Idris, owner of the El-Shifa pharmaceutical plant, brought an action against the United States for negligence, trespass, defamation and violation of the laws of nations stemming from the destruction of the plant, its fixtures, equipment and inventory with cruise missiles launched from U.S. naval vessels stationed in international waters. After a November 29, 2005 Memorandum Opinion and Order ("November 29th Opinion") granted defendant's motion to dismiss for failure to establish waiver of sovereign immunity,

plaintiffs moved under Fed. R. Civ. P. 59(e) to alter the judgment, requesting the reinstatement of their defamation (Count Three) and law of nations claims (Count Four). Because plaintiffs have not demonstrated that the November 29th Opinion involved a clear error of law, plaintiffs' motion to alter the judgment will be denied.

"While the court has considerable discretion in ruling on a Rule 59(e) motion, the reconsideration and amendment of a previous order is an unusual measure." *Sieverding v. Am. Bar Ass'n*, 239 F.R.D. 288, 290 (D.D.C. 2006) (citing *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)). A motion to alter the judgment need not be granted unless there is an intervening change of controlling law, new evidence becomes available, or there is a need to correct a clear error or prevent manifest injustice. *Ciralsky v. Cent. Intelligence Agency*, 355 F.3d 661, 671 (D.C. Cir. 2004).[1]

Plaintiffs argue the court should reconsider the dismissal of their defamation claim because the court

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[1] In addition to their new arguments regarding claims under Count Three and Four, plaintiffs reiterate their previous contentions concerning the inapplicability of the political question doctrine to the defamatory statements and the declaratory relief sought by the law of nations claim. (*See* Pls.' Mem. in Supp. of Mot. to Alter J. ("Pls.' Mot. to Alter J.") at 5-7.) However, plaintiffs do not provide any new evidence or intervening law that might support reconsideration of the November 29th Opinion. Because "motions for reconsideration are not a second opportunity to present argument upon which the Court has already ruled," *Black v. Tomlinson*, 235 F.R.D. 532, 534 (D.D.C. 2006) (internal quotation omitted), plaintiffs' renewed arguments regarding the political question doctrine do not entitle plaintiffs to the relief they seek in this motion.

incorrectly assumed(1) that plaintiffs challenged only presidential decision-making, and (2) that the Federal Torts Claim Act ("FTCA") is the exclusive remedy for all defamation actions against the government. (*See* Pls.' Mem. in Supp. of Mot. to Alter J. ("Pls.' Mot. to Alter J.") at 4-5.) Plaintiffs claim that they seek relief for statements made by agency officials that Idris was an associate of Osama bin Laden under § 702 of the Administrative Procedure Act ("APA"), which provides a waiver for claims involving declaratory and injunctive relief. (*See id.* at 3.)

Assuming that § 702 allows a waiver of sovereign immunity, *see Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006) (noting that "APA's waiver of sovereign immunity applies to any suit whether under the APA or not . . . . There is nothing in the language of the second sentence of § 702 that restricts its waiver to suits brought under the APA" (internal citation omitted)), § 704 nevertheless requires that the disputed conduct constitute final agency action. These alleged defamatory statements do not. *See id.* at 189 (citing *Hearst Radio v. Fed. Communic'ns Comm'n*, 167 F.2d 225 (D.C. Cir. 1948) for the proposition that a defamatory publication of the FCC was not final agency action for APA purposes).[2] The APA defines "agency action" as

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[2] Plaintiffs claim that the D.C. Circuit has previously stated that agency defamation might be reviewable under the APA. *See, e.g., Impro Prods., Inc. v. Block*, 722 F.2d 845, 849 (D.C. Cir. 1983) ("Indeed, we find it troubling that literal adherence to the *Hearst Radio* rule in a case like this one would preclude judicial review under the APA of an agency's dissemination of information that is concededly false . . . . Moreover, because the Federal Tort Claims Act expressly preserves sovereign

"includ[ing] the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). These defamatory statements, at best, might be characterized as sanctions. However, numerous courts have rejected classifying defamatory statements as sanctions based on the APA's definition.[3] *See, e.g., Trudeau*, 456 F.3d at 189 (relying on *Hearst Radio*, 167 F.2d at 227, to conclude that "'[a]mong these words, the only one approaching applicability to the publication . . . is the word "sanction,"' and that the definition of that word 'does not cover an act such as' the [defamatory] FCC publication."). Thus, even if sovereign immunity is waived, plaintiffs' defamation claim is still not

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immunity from suits for money damages for libel and slander, . . . the agency would also be insulated from civil tort liability."). Nevertheless, the D.C. Circuit recently noted that "we have never had the need either to reconsider *Hearst Radio*, or to consider whether it is distinguishable [because other cases involving false or defamatory statements were resolved on grounds other than whether the statement was final agency action]." *Trudeau*, 456 F.3d at 189. Although plaintiffs correctly state that *Hearst Radio* "considered only publication of a routine, industry-wide report, not a deliberate attempt to stigmatize a targeted individual" (Reply Mem. in Supp. of Mot. to Alter J. ("Pls.' Reply") at 7), *Trudeau* considered and rejected an argument that a press release which plaintiff alleged contained false and misleading personal information was final agency action under the APA. *Trudeau*, 456 F.3d at 189.

[3] The APA defines "sanction" as "(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person; (B) withholding of relief; (C) imposition of penalty or fine; (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (F) requirement, revocation, or suspension of a license; or (G) taking other compulsory or restrictive action." 5 U.S.C. § 551(10).

reviewable under the APA because plaintiffs do not factually allege final agency action.

Plaintiffs also seek reconsideration of the dismissal of their law of nations claim. They argue that the November 29th Opinion erroneously concluded that because the President's decision to use military force to target El-Shifa was at issue, the court lacked subject matter jurisdiction. *El-Shifa Pharm. Indus. v. United States*, 402 F. Supp. 2d 267, 273 (D.D.C. 2005). Instead, plaintiffs argue that they request declaratory relief for the failure of the Central Intelligence Agency ("CIA") to provide compensation for the destruction of the plant. They contend that presidential decision-making played no role in the CIA's unwillingness to compensate. (Pls.' Mot. to Alter J. at 6.)

In their complaint, plaintiffs seek review of "the refusal of the United States to pay just compensation for the destruction of the Plant or otherwise acknowledge that the destruction of the Plant was mistaken and not justified under the law of nations . . . ." (Pls.' Compl. ¶ 115.) The plain language of this request implicates the President's decision to destroy the plant, and any CIA decision not to compensate plaintiffs is predicated on unreviewable presidential action under the APA. *See Dalton v. Spencer*, 511 U.S. 462, 469-70 (1994) (holding that the President took the final action that created the situation in dispute and that APA review was not available because the President is not an agency within the meaning of the APA). Although plaintiffs maintain that neither "President Clinton [nor] President Bush was involved in the decision to deny compensation" (Pls.' Mot. to Alter J. at 6.), the conduct prompting

the compensation sought resulted from a decision made within the exercise of presidential discretion, and plaintiffs cite to no authority suggesting that the judicial review of such action that they seek is justified. *Cf. Tulare County v. Bush*, 185 F. Supp. 2d 18, 28-29 (D.D.C. 2001) (dismissing plaintiffs claims under the APA because the agency action at issue involved implementation of presidential directives "and the APA does not apply to presidential action").

Because plaintiffs do not provide any new arguments or evidence indicating that the court's dismissal of their defamation and law of nations claims involved a clear error of law, it is hereby

ORDERED that plaintiffs' motion [45] to alter judgment be, and hereby is, DENIED.

SIGNED this 28th day of March, 2007.

/s/

RICHARD W. ROBERTS
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 01-731 (RWR)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendant's motion to dismiss [#8] be, and hereby is, GRANTED.

This is a final appealable order.

SIGNED this 29th day of November, 2005.

/s/
RICHARD W. ROBERTS
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 01-731 (RWR)

MEMORANDUM OPINION

Plaintiffs, El-Shifa Pharmaceutical Industries Company ("El- Shifa"), a stock corporation located in Sudan, and Salah El Din Ahmed Mohammed Idris, owner of the El-Shifa pharmaceutical plant, bring this action against the United States for negligence, trespass, defamation and violation of the laws of nations stemming from the destruction of the plant, its fixtures, equipment and inventory with cruise missiles launched from U.S. naval vessels stationed in international waters. Defendant has filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Because plaintiffs have failed to show that the

United States has waived its sovereign immunity from suit over these claims, which likely present a non-justiciable political question in any event, defendant's motion to dismiss will be granted.

BACKGROUND

On or about August 20, 1998, cruise missiles launched from United States naval vessels stationed in international waters destroyed the El-Shifa plant located in North Khartoum, Sudan. (Compl. ¶ 21.) The U.S. government stated that it carried out the attack in response to the bombings earlier that month of the U.S. embassies in Kenya and Tanzania by terrorists under the direction of Osama bin Laden. (*Id.* ¶ 22.) On the day of the attack, President Clinton, in a televised address, described the El-Shifa pharmaceutical plant as a "chemical weapons-related facility." (*Id.* ¶ 27(a).)

Plaintiffs allege that other U.S. officials, including Secretary of State Madeline Albright, made claims that the El-Shifa plant manufactured chemical weapons. (*Id.* ¶¶ 27(b)-(c).) Plaintiffs further contend that the determination that El-Shifa was involved with chemical weapons production resulted from negligent testing of soil samples from around the plant, which concluded that the samples contained particular chemicals related to chemical weapon manufacturing. (*Id.* ¶¶ 32-33.) The complaint alleges that U.S. officials also claimed that the El-Shifa plant was a terrorist base of operations and was associated with the Osama bin Laden network. (*Id.* ¶ 43.) Finally, the complaint alleges that U.S. newspapers and other press reported that the principal owner of El-Shifa, Salah El Din Ahmad Mohammed Idris, had

ties to Osama bin Laden and the Islamic Jihad. (*Id.* ¶ 66.)

Four days after the attacks on the plant, the U.S. government froze $24 million in assets held by Idris in a bank located in the United States. (*Id.* ¶ 70.) Plaintiffs filed this action against the United States, citing mounting evidence that the attack was a grievous mistake (Compl. ¶ 74-82), and claiming negligence and trespass under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) (2000), defamation and a violation of the law of nations. (*Id.* ¶¶ 88-116.) The government filed a motion to dismiss for lack of subject matter jurisdiction.

DISCUSSION

Under Rule 12(b)(1), "the plaintiff[] bear[s] the burden of proving by a preponderance of the evidence that the Court has subject matter jurisdiction." *Biton v. Palestinian Interim Self-Gov't Auth.*, 310 F. Supp. 2d 172, 176 (D.D.C. 2004); *Corel Corp. v. United States*, 165 F. Supp. 2d 12, 21 (D.D.C. 2001). In deciding a motion to dismiss, a court must draw all inferences from the facts alleged in the complaint in the plaintiff's favor. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982); Artis v. Greenspan, 158 F.3d 1301, 1306 (D.C. Cir. 1998).

I. TORT CLAIMS

The government argues that this court lacks subject matter jurisdiction because the United States has not waived its sovereign immunity from suit for the claims plaintiff has alleged. The United States, as sovereign, is immune from suit absent its explicit consent to be sued. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *Kugel v. United States*, 947 F.2d

1504, 1506 (D.C. Cir. 1991). A waiver of "sovereign immunity must be unequivocally expressed in statutory text" and will be "strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996); *see also Cummings v. Dep't of the Navy*, 279 F.3d 1051, 1055 (D.C. Cir. 2002).

The FTCA grants federal courts jurisdiction over claims against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the [g]overnment while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). This waiver, however, is subject to a number of specific exceptions. *See* 28 U.S.C. § 2680; *see also Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154, 1156 (D.D.C. 1991), *aff'd*, 957 F.2d 886 (D.C. Cir. 1992)(holding that "[i]f a claim falls within any exception to the FTCA, sovereign immunity has not been waived and the court is without jurisdiction to hear the case").

In its motion to dismiss, the government argues that the discretionary function exception bars plaintiffs' claims under the FTCA.[1] The discretionary function exception exempts from coverage of the FTCA:

> [a]ny claim based upon an act or omission of an employee of the Government, exercising

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[1] The government also argues that the foreign country exception, 28 U.S.C. § 2680(k), and the combatant activities exception, 28 U.S.C. § 2680(j), apply to bar suit under the FTCA. Because the court lacks subject matter jurisdiction under the discretionary function exception, these two bases for dismissal need not be addressed.

> due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). The exception applies only to employee acts that involve an element of judgment or choice. *United States v. Gaubert*, 499 U.S. 315, 322 (1991). Moreover, "'even if the challenged conduct involves an element of judgment,' that judgment must be 'of the kind that the discretionary function was designed to shield.'" *Sloan v. U.S. Dep't of Hous. & Urban Dev.*, 236 F.3d 756, 760 (D.C. Cir. 2001) (quoting *Gaubert*, 499 U.S. at 322-23). *Gaubert* noted that the exception was designed to "'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" *Gaubert*, 499 U.S. at 323 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)). Therefore, "when properly construed, the exception 'protects only governmental actions and decisions based on considerations of public policy.'" *Id.* (quoting *Berkovitz v. United States*, 486 U.S. 531, 537 (1988)).

In *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988), *aff'd in relevant part, rev'd in part*, 886 F.2d 438 (D.C. Cir. 1989), residents of Libya sued to recover damages for death, personal injury and the destruction of property resulting from U.S. military air strikes on targets in Libya ordered by President Reagan. Plaintiffs asserted jurisdiction on various

grounds including the FTCA. *Saltany*, 702 F. Supp. at 320. The court dismissed the complaint for lack of subject matter jurisdiction, concluding that none of the statutory provisions relied upon, including the FTCA, waived the United States' sovereign immunity. Id. at 321 n.4 (holding that "[t]he Federal Tort Claims Act expressly preserves the sovereign immunity of the United States for acts of its officials that involve the exercise of discretion"). In *Industria Panificadora*, the court held that the discretionary function exception applied to preclude challenges to executive branch decisions concerning the numbers of military personnel to be utilized, their deployment and the kinds of orders to be issued during the American military invasion of Panama. 763 F. Supp. at 1158.

Here, the President chose to deploy military personnel to take military action against targets in Sudan. As Commander in Chief of the armed forces, the President of the United States is authorized, but not required, to order military units into action. *See* U.S. Const. art. II, § 2; *see also Saltany*, 702 F. Supp. at 321 (stating that the President "acted with absolute immunity from liability in private civil suits for damages" when he ordered military units into action in his capacity as Commander in Chief of the armed forces). The President's decision was based upon a judgment - - whether inaccurate or not - - that the El-Shifa plant posed a threat to the national security of the United States. *Saltany*, 702 F. Supp. at 321. This decision was a policy judgment protected by the discretionary function exception which renders the United States absolutely immune from suit for this decision. *See Saltany*, 702 F. Supp. at 321-22; *Industria Panificadora*, 763 F. Supp. at 1158.

Plaintiffs argue that their actions for negligence and trespass do not fall within the discretionary function exception to the FTCA because their complaint "challenge[s] the negligent and reckless analyses of the soil sample and other evidence that led the government to conclude that the El-Shifa plant was producing materials for chemical weapons and to target the plant for destruction." (Pls.' Mem. in Opp. to Mot. to Dismiss ("Pls.' Mem.") at 16.) They argue that these determinations were "factual in nature and did not involve the exercise of any policy judgment." *Id.*

However, plaintiffs are seeking damages caused by the military force used against the plant that was ordered by the President. The soil sample analysts did not order the destruction of the plant. Plaintiffs' characterization of this action as a challenge to the soil testing results rather than to the President's actions cannot remove this case from resting within an FTCA exception that otherwise applies. *See Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 286 (3d Cir. 1995) (holding that the court need not accept plaintiffs' characterization of the facts and that it "know[s] of no authority for the proposition that plaintiffs, by the manner in which they draft their complaints, may dictate that their claims are 'based upon' one government employee's actions and not another's"); *see also Gen. Dynamics Corp. v. United States*, 139 F.3d 1280, 1283 (9th Cir. 1998) (holding that "[c]ourts are not required to, and should not, simply look at the surface of a complaint for the purpose of ascertaining the true basis of an attack upon something the government has done"); *Kowal v. MCI Communication Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)(holding that the court need not accept

legal conclusions cast in the form of factual allegations). The discretionary function exception to the FTCA, therefore, precludes plaintiffs' claims for negligence and trespass.

Plaintiffs' defamation claim also fails because plaintiffs cite to no explicit waiver of sovereign immunity for defamation claims. Indeed, the FTCA specifically exempts defamation actions from its waiver of sovereign immunity. *See* 28 U.S.C. § 2680(h)[2]; *Hosey v. Jacobik*, 966 F. Supp. 12, 15 n.2 (D.D.C. 1997)(noting that "[t]he statute refers specifically to 'slander' and 'libel.' . . . However, defamation is simply a broader term for slander and libel") (citations omitted); *Buss v. United States*, 1997 WL 195522, *1 (D.C. Cir. Mar. 5, 1997).

II. LAW OF NATIONS CLAIM

Plaintiffs seek declaratory relief for the United States' refusal to provide compensation for the destruction of El-Shifa arguing that the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, provides a waiver of sovereign immunity for their violation of the law of nations claims. (Compl. ¶ 110.) Plaintiffs implicitly assert jurisdiction pursuant to 28 U.S.C. § 1350, the Alien Tort Claims Act (the "ATCA"), when they argue that the defendant has violated the law of nations. (Compl. ¶ 1.) However, "[t]he Alien Tort Claims Act, which confers jurisdiction upon U.S. district courts to hear tort

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[2] 28 U.S.C. § 2680(h) provides in pertinent part: "The provisions of this chapter and section 1346(b) of this title shall not apply to . . . [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.*

claims by aliens for alleged violations of U.S. treaties and the law of nations, is not itself a waiver of sovereign immunity, at least not that of the United States." *Saltany*, 702 F. Supp. at 320 n.4 (citing *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985)).

The APA waives sovereign immunity because it provides for judicial review of federal administrative agency action. It provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA, however, provides for judicial review only of final agency action. 5 U.S.C. § 704. *See e.g. Tulare County v. Bush*, 185 F. Supp. 2d 18, 27 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir.), *cert. denied*, 540 U.S. 813 (2003). Because "the President is not an agency within the meaning of the Act," *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992), "presidential actions are not subject to review pursuant to the APA." *Tulare County*, 185 F. Supp. 2d at 28; *see also Dalton v. Specter*, 511 U.S. 462, 470 (1994). Here, the action in question is the President's decision to target and strike El-Shifa. Because the APA does not provide a waiver of the United States' sovereign immunity from challenges to presidential decisions, the APA does not grant this court subject matter jurisdiction over the law of nations claim.

III. NONJUSTICIABLE POLITICAL QUESTION

The government also argues that plaintiffs' action should be dismissed because it involves a nonjusticiable political question. "The political question doctrine excludes from judicial review those

controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Political questions have been described as "'political act[s], belonging to the executive department alone for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy . . . .'" *Antolok v. United States*, 873 F.2d 369, 379 (D.C. Cir. 1989) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803)). Federal courts are not prohibited in all instances from reviewing cases that may touch on sensitive political, military or foreign policy issues.[3] *Baker v. Carr*, 369 U.S. 186, 211 (1962). The judiciary, however, is considered "particularly ill suited to make such decisions, as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." *Japan Whaling Ass'n*, 478 U.S. at 230 (internal quotations omitted).

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[3] The courts have determined, for example, that the president cannot seize private steel mills even during a time of war, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), that the Secretary of Commerce was required to certify that Japan's whaling practice caused an international treaty to be less effective, *Japan Whaling Ass'n*, 478 U.S. 221, that the executive branch must allow a citizen detained as an enemy combatant the right to challenge his classification under due process, *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004), and that the manual recounting of votes for a contested presidential election must stop. *Bush v. Gore*, 531 U.S. 98 (2000).

Nonjusticiablility, as defined by the Supreme Court, is "the inappropriateness of the subject matter for judicial consideration." *Baker*, 369 U.S. at 198. The *Baker* Court identified the following elements of nonjusticiable political questions:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. If even one of these elements is present, "then adjudication of the case may be said to require resolution of a political question, which is nonjusticiable and hence not reviewable by a court." *Industria Panificadora*, 763 F. Supp. at 1159 (citing *Baker*, 369 U.S. at 217).

"It is well established that decisions pertaining to national security, such as whether and how to use military forces, are entrusted to the political branches." Id. at 1159-60; *see also Haig v. Agee*, 453 U.S. 280, 292 (1981) (recognizing that "[m]atters

intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"). Article II, § 2 of the Constitution provides that "the president shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States." U.S. Const. art. II, § 2. *See Schneider v. Kissinger*, 412 F.3d 190, 195 (D.C. Cir. 2005) (noting that "Article II . . . provides allocation of foreign relations and national security powers to the President, the unitary chief executive"); *DaCosta v. Laird*, 471 F.2d 1146, 1154 & n.13 (2d Cir. 1973) (noting that the Constitution has a "specific textual commitment of decision making responsibility in the area of military operations in a theatre of war to the President, in his capacity as Commander in Chief"). As for foreign policy, the President possesses "'plenary and exclusive power' in the international arena" and acts "'as the sole organ of the federal government in the field of international relations.'" *Schneider*, 412 F.3d at 195 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

The bombing of the El-Shifa pharmaceutical plant was the type of policy decision that the government argues is textually committed to the Executive branch by the Constitution. The text of the Constitution commits to the executive exclusively a decision to engage the military on foreign soil in protection of national security. U.S. Const. art. II, § 2; *Schneider*, 412 F.3d at 195. The plaintiffs claim that they ask the court only to "determine whether a pharmaceutical plant was mistakenly identified as a chemical weapons facility[,] ... whether Mr. Idris was recklessly defamed" and "whether the law of nations was violated." (Pl.'s Mem. at 29.) However, a

jurisdictional bar posed by the political question doctrine is not avoided by framing the claims using common tort principles.

With the complaint viewed as essentially challenging President Clinton's decision that El-Shifa was a threat to the nation's security, the second element articulated in *Baker* is also applicable because no judicially discoverable and manageable standards exist for a judicial assessment of that decision. Certain "decisions which affect our national security involve policy decisions beyond the scope of judicial expertise." *Industria Panificadora*, 763 F. Supp. at 1160. For this court "[t]o attempt to decide such a matter without the necessary expertise and in the absence of judicially manageable standards would be to entangle the court in matters constitutionally given to the executive branch." *In re Korean Air Lines Disaster*, 597 F. Supp. 613, 616 (D.D.C. 1984), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987). Federal courts also lack the resources to evaluate so many of the executive's policy decisions on issues of national security, foreign relations, or military engagement. "[T]he judiciary has no covert agents, no intelligence sources, and no policy advisors[,]" thus rendering the courts "ill-suited to displace the political branches in such decision making[.]" *Schneider*, 412 F.3d at 196; *Crockett v. Reagan*, 720 F.2d 1355, 1356 (D.C. Cir. 1983) (concluding that "the war powers issue presented a nonjusticiable political question" and the "court did not have the resources or expertise to resolve the particular factual disputes involved").

Even if the court were able to determine that a government employee was negligent in taking a soil sample, courts play no role in evaluating the

reliability or the truthfulness of the executive's own intelligence, nor do courts substitute their judgment for the executive's in weighing or evaluating the information used in coming to a policy decision. *See El-Shifa Pharm. Indus., Inc. v. United States*, 378 F.3d 1346, 1365 (Fed. Cir. 2004)(noting that "the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered")[4]; *Industria Panificadora*, 763 F. Supp. at 1160-61 (holding that allegations of negligence on the part of government personnel in failing to provide adequate numbers of police to maintain public order during the invasion of Panama presented a nonjusticiable political question).

The executive's determination that the pharmaceutical plant was a chemical weapons-related facility appears equally unreviewable. This designation, erroneous though it may have been, was made as part of a military response to the terrorist bombings of the U.S. embassies in Kenya and Tanzania. (Compl. ¶ 22.) It is this type of delicate decision regarding national security, foreign relations, and global politics that is entrusted to the sole discretion of the executive. *See People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (holding that the Secretary of State's determination that the terrorist

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[4] That Federal Circuit case involves the same parties and underlying facts as does the instant case, and the Federal Circuit affirmed the dismissal of the case based on the political question doctrine. Given this court's disposition of this case, it is not necessary to address issue or claim preclusion stemming from the Federal Circuit's opinion.

activities of two organizations "threaten[] the security of United States nationals or the national security of the United States" is a nonjusticiable political question, but reviewing whether the Secretary of State made findings that the organizations were foreign and that they engaged in terrorist activities before designating the organization terrorist as mandated by the Antiterrorism and Effective Death Penalty Act). Even in the case of a reviewable designation that touches on national security and foreign relations, the Supreme Court has emphasized that "our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Hamdi*, 542 U.S. at 531 (holding that a citizen "seeking to challenge his classification as an enemy combatant" has a right to due process.)

Finally, review of the President's decision to bomb the plant and the underlying factual basis for it without any judicially manageable standards could involve a policy determination beyond the court's discretion to make. A judicial inquiry into the reasonableness of the judgments made regarding the El-Shifa plant could mimic the executive's role in formulating foreign policy, could improperly interfere with the executive's role in commanding the country's military forces, and could require an inappropriate second-guessing of executive branch decisions. *Industria Panificadora*, 763 F. Supp. at 1161 (noting that "an independent resolution would show a lack of respect due to a coordinate branch").

The true nature of plaintiffs' action is for damages arising out of the destruction of El-Shifa and the

statements made by U.S. officials to justify the military action. (Compl. ¶ 1.) Although plaintiffs have characterized their claims using traditional tort vocabulary, "their allegations implicate broader political questions that encompass U.S. foreign policy and military operations." *Industria Panificadora*, 763 F. Supp. At 1161. The plaintiffs' claims likely present a nonjusticiable political question over which the court would lack jurisdiction.

CONCLUSION

Plaintiffs have failed to show that the United States has waived its sovereign immunity regarding the claims asserted in this action. In addition, this action likely presents a nonjusticiable political question. Because this court lacks subject matter jurisdiction over plaintiffs' claims, the complaint will be dismissed. A final Order accompanies this Memorandum Opinion.

SIGNED this 29th day of November, 2005.

/s/

RICHARD W. ROBERTS
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5174 **September Term 2008**
01cv00731

Filed On: August 3, 2009

El-Shifa Pharmaceutical Industries Company
and Salah El Din Ahmed Mohammed Idris,

Appellants

v.

United States of America,

Appellee

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, the response thereto, and the vote in favor of the petition by a majority of the judges eligible to participate, it is

ORDERED that the petition be granted. The case will be reheard by the court sitting en banc. It is

FURTHER ORDERED that the court's March 27, 2009 judgment be vacated. It is

FURTHER ORDERED that oral argument before the en banc court will be heard at 9:30 a.m. on Wednesday, December 16, 2009. It is

FURTHER ORDERED that the parties submit 20 copies each of briefs and the appendix in accordance with the following schedule:

Brief for Appellants	September 21, 2009
Appendix	September 21, 2009
Brief for Appellee	October 21, 2009
Reply Brief for Appellant	November 4, 2009

Because the briefing schedule is keyed to the date of argument, the court will grant requests for extension of time limits only for extraordinarily compelling reasons. All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5174 **September Term 2008**
01cv00731

Filed On: August 3, 2009

El-Shifa Pharmaceutical Industries Company
and Salah El Din Ahmed Mohammed Idris,

Appellants

v.

United States of America,

Appellee

BEFORE: Ginsburg, Henderson, and Griffith, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed May 8, 2009, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY, and SALAH EL DIN AHMED MOHAMMED IDRIS, *** *****, Norfolk Crescent, London, England, Plaintiffs, vs. UNITED STATES OF AMERICA. Defendant.	**COMPLAINT IN CIVIL ACTION**

NATURE OF THE ACTION

1. This is a civil action, pursuant to 5 U.S.C. § 702 and 28 U.S.C. §§ 1331, 1346, 1350, and 2201, for declaratory relief and for compensatory damages arising out of (1) the destruction of the El-Shifa pharmaceutical plant (the "Plant") in North Khartoum, Sudan on or about August 20, 1998 by the armed forces of the United States as a result of the mistaken identification of the Plant as a chemical

weapons facility and (2) false and defamatory statements made by United States government officials seeking to justify this action.

THE PARTIES

2. Plaintiff El-Shifa Pharmaceutical Industries Company ("El-Shifa") is a stock corporation organized under the laws of Sudan. At all relevant times, El-Shifa was the owner of the Plant.

3. Plaintiff Salah El Din Ahmed Mohammed Idris is a citizen of Sudan and the Kingdom of Saudi Arabia. Mr. Idris is engaged in business and investment activities in many countries throughout the world, including the United States. He is also the principal owner of El-Shifa.

4. The United States of America is the Defendant in this action.

JURISDICTION

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1346, and 1350.

FACTS COMMON TO ALL COUNTS

A. The Plant

6. Sudan is among the world's poorest countries, whose limited resources have been drained by civil war extending over 15 years. The people of Sudan suffer from many deadly diseases, including malaria, hepatitis, meningitis, tuberculosis, and bilharzia, as well as malnutrition and starvation in significant segments of the population. The livestock of Sudan, which plays an important role in the economy and nutrition of the country's nomadic people, is commonly infected by parasites, malaria and other

diseases. Sudan has one of the world's lowest rates of medical doctors per general population and one of the most inadequate supplies of basic pharmaceuticals. Consequently, adult life expectancy in Sudan is depressingly low and infant mortality exceptionally high.

7. Though small by western standards, El-Shifa was the largest pharmaceutical manufacturing company in Sudan, producing over 50% of both the human and veterinary pharmaceuticals distributed in that country. El-Shifa produced an even greater percentage of the antibiotics used to treat malaria, which is the leading cause of death in Sudan.

8. The Plant did not manufacture pharmaceuticals from raw material chemicals and did not have the sophisticated facilities that are needed to do so.

9. The Plant was instead dedicated to encapsulating, mixing, blending, and packaging human and veterinary pharmaceuticals produced by others and distributing such pharmaceuticals in Sudan and elsewhere. The Plant repackaged pharmaceutical products, which were imported in bulk quantities, into finished consumer products such as tablets and capsules for ibuprofen, antibiotics, anti-malarial drugs, anti-diarrhea drugs, and infusion medicines.

10. The Plant was divided into several different areas.

a. In the primary section of the Plant's main building, there were five lines that produced tablets, syrups, dry suspensions for oral use, creams, and ointments. Capsules for Shifambecine, an El Shifa-trademarked product similar to Refambicin

used for the treatment of tuberculosis, were also manufactured in this section.

b. The main building also contained a separate Beta-lactam section with a line for capsules and another for dry suspensions for oral use that produced antibiotics.

c. There was as well a self-contained sterile area for the production of sterile injectable liquids in the main building.

d. Another part of the Plant contained the veterinary factory, which had four lines that produced powders, large and small sachets, syrups, and sterile injectables.

e. The Plant also contained a quality control laboratory, where analysis of raw materials and finished products took place as well as a water-purifying unit producing purified water and distilled water for syrups and medicines used for injections.

11. The Plant did not contain any facilities sophisticated enough to be used to manufacture chemical weapons or any chemical components of chemical weapons.

12. By the time the Plant was destroyed in August 1998, El-Shifa had registered 33 commercial products with various regulatory authorities and organizations.

13. The United Nations had also approved El-Shifa to supply veterinary medicines to Iraq under the U.N. 's "Oil For Food" program.

B. Salah Idris Purchases El-Shifa

14. Salah Idris was born and raised in the town of Shendi in Sudan but emigrated to Saudi Arabia,

where he became a highly-successful banker and businessman. Specifically, Mr. Idris became one of the top officers and a member of the Executive Committee of Saudi Arabia's largest commercial bank, the National Commercial Bank of Saudi Arabia.

15. Personally and through the National Commercial Bank of Saudi Arabia, Mr. Idris caused a number of financial investments to be made in his native Sudan that he hoped would provide needed jobs and commercial activity for impoverished Sudanese.

16. In March 1998, Mr. Idris purchased the shares of El-Shifa for approximately $18 million in an arms-length business transaction with the private parties who previously owned the company. El-Shifa's principal business activity was the ownership and operation of the Plant, which consisted of an administrative building, pharmaceutical plant, warehouse, and support facilities.

C. Foreign Inspection of the Plant

17. The Plant was the beneficiary of a loan from the Eastern and Southern African Trade and Development Bank ("PTA"), a development bank for east African countries based in Nairobi, Kenya. As a result of the loan, PTA held a mortgage on the Plant for more than $5 million. In monitoring its loan, PTA continuously sent auditors to the Plant to ensure that it was operating as it was supposed to and that the prospects for repayment were real.

18. In the regular course of the business of PTA, these auditors made and kept records, which show that the Plant was engaged in the commercial production of pharmaceuticals. The factory's own

sales and production records, likewise made and kept in the regular course of the business of the Plant, also show its solely commercial nature.

19. Because it addressed critical public health needs and was one of the few modern facilities of any kind in Sudan, the Plant was an object of public pride and a symbol of hope frequently shown to foreign visitors to Sudan. As a consequence, in the five-year period before the bombing, several thousand visitors toured the Plant. During these tours, every part of the Plant was open to visitors.

20. When the Plant was attacked, Bobby May, a long-time friend of President Clinton and now a businessman seeking oil and gas investments in Africa, was in Khartoum. He had toured the Plant a few days before the raid and walked around it with no evident restrictions on his movement as El-Shifa employees packaged and bottled medicines.

D. The Attack on the Plant

21. On or about August 20, 1998, the United States, without warning, purposefully destroyed the Plant, its fixtures, equipment, and inventory. According to statements by U.S. officials, the Plant was destroyed by cruise missiles launched from U. S. naval vessels stationed in international waters.

22. The U.S. government stated that this attack was carried out in response to the bombings earlier that month of the U.S. embassies in Kenya and Tanzania by terrorists under the direction of Osama bin Laden in which many American, Kenyan, and Tanzanian citizens were killed. The U.S. treats bin Laden, who has been criminally indicted in the U.S. and is on the F.B.I.'s list of the "ten most wanted

criminals," as a criminal, not as a belligerent in wartime.

23. Only three days before the attack, then-President William Clinton appeared on national television and made certain admissions concerning his relationship with Monica Lewinsky that were personally and politically embarrassing to him and to the First Lady. The negative political reaction to the President's address, coupled with continued intense coverage of the Lewinsky matter, represented a low point in the Clinton presidency. Final approval of the attack was given less than 24 hours before the attack was launched and just prior to Ms. Lewinsky's second appearance (on August 20) before the grand jury. President Clinton and his advisors hoped that destruction of the Plant and other action taken in response to the bombings would help restore his diminished presidential authority and popularity.

24. There was no factual warrant for selecting the Plant for destruction. The United States was not at war with Sudan. The Plant was not a chemical weapons facility, was not connected to bin Laden or to terrorism, and was not otherwise a danger to public health and safety.

E. The Initial Justifications

25. The United States has not kept secret the evidence on which it relied in destroying the Plant. In on-the-record and off-the-record briefings, U.S. officials have repeatedly described the information in the U.S. government's possession supposedly supporting the bombing and have indicated their willingness to disclose classified intelligence information to bolster the government's case. For example, Secretary of State Madeleine Albright

stated on August 21, 1998 that "[t]he information as to what we have will become available in time." Similarly, Kenneth Bacon, the Assistant Secretary of Defense for Public Affairs, told reporters on September 8, 1998 that he would make what he called "the intelligence community" available to respond to press "questions" and would let them "talk about the intelligence."

26. None of the U.S. government's explanations for its actions in destroying the Plant, which have repeatedly changed when confronted with conflicting evidence, has any merit. All of the justifications for the attack advanced by the United States were based on false factual premises and were offered with reckless disregard for the truth based upon grossly incomplete research and unreasonable analysis of inconclusive intelligence.

1. Production of Chemical Weapons

27. The principal justification advanced for the attack on the Plant was that the Plant was involved in the production of chemical weapons.

a. On the day of the attack, August 20, 1998, President Clinton described the El-Shifa pharmaceutical plant in a televised address to the nation as a "chemical weapons-related facility."

b. That same day Secretary of State Albright made similar sensational assertions to support the attack on this small, innocuous plant 8,000 miles from U.S. shores. She said: "In Sudan, they are there manufacturing nerve gas which could kill us all."

c. Other U.S. officials made less dramatic but equally false claims that the Plant manufactured

O-ethylmethyl phosphonothioic acid, or EMPTA, a substance which is not itself a chemical weapon, but which can be used in the production of VX nerve gas. For example, the Department of State issued a statement on August 20, 1998 that "[t]he U.S. is confident that this Sudanese Government-controlled facility is involved in the production of chemical weapons agents including precursor chemicals for the deadly V series of nerve agents like for example, VX."

d. At a briefing on August 20, 1998, Secretary of Defense William S. Cohen stated: "We do know that this facility produces the precursors that can result in the production of XV." Secretary Cohen also stated that "the facility that was targeted in Khartoum produced the precursor chemicals that would allow the production of a type of FX nerve agent." A "senior intelligence official" at Secretary Cohen's briefing further stated that "[w]e know with high confidence that Shifa produces a precursor that is unique to the production of VX."

e. Samuel R. ("Sandy") Berger, Assistant to the President for National Security Affairs, similarly stated on August 20, 1998 that "we know with great certainty [that the Plant] produces essentially the penultimate chemical to manufacture VX nerve gas . . . ."

28. These statements were false. The Plant was not a chemical weapons facility, and it was not involved in the production of chemical weapons or even chemicals used in the production of chemical weapons.

29. The claim that the Plant produced EMPTA was eventually abandoned by U.S. officials. In fact, while Assistant Secretary of Defense for Public

Affairs Kenneth Bacon stated at a press briefing on September 8, 1998, that "we believe now, as we did at the beginning, that this plant does make EMPTA," his remarks were later "corrected" to read: "this plant had evidence of EMPTA present." In addition, according to a report on August 21, 1999, an "administration official" told *The Washington Post* that statements made the night of the attack claiming knowledge that the Plant produced EMPTA were "inaccurate." "We never had evidence of that," the official said. "The correct statement, and it has been corrected, was that EMPTA was present at the plant."

30. According to the United States, a soil sample from the Plant showed the presence of EMPTA. This sample was taken from surface soil in the vicinity of the Plant months before the attack by an Egyptian operative. The United States claimed that the presence of EMPTA proved involvement in chemical weapons production because the chemical has no known use other than as a component in the production of VX nerve gas.

31. In fact, the Organization for the Prohibition of Chemical Weapons ("O.P.C.W."), an international organization in the Hague responsible for monitoring international compliance with the chemical weapons treaty, classifies EMPTA as a schedule 2b compound, that is, a compound that can be used to make chemical weapons but that has commercial applications as well. According to the O.P.C.W., EMPTA can be used "in limited quantities for legitimate commercial purposes" such as fungicides and antimicrobial agents.

32. The claim that EMPTA was present in the soil near the Plant was false. Neither EMPTA nor any other chemical weapons precursors were manufactured at, stored at, or transported to the Plant.

33. The U.S. claim that EMPTA was found in soil near the Plant was a fabrication or a mistake resulting from seriously flawed procedures.

a. A report or memorandum prepared by the Central Intelligence Agency on or about July 24, 1998 found that the soil sample taken and relied upon by the United States did not provide conclusive evidence of chemical weapon-related activity and recommended that more soil samples be taken to help determine whether the Plant was involved with making chemical weapons.

b. The claim that EMPTA was found in the soil near the Plant is implausible on its face because, if present in ground soil, EMPTA breaks down quickly into a substance known as EMPA, which then would remain and be detectable in the soil for years.

c. The agent who supposedly collected the soil sample from El-Shifa was not a U.S. intelligence agent but an Egyptian operative. Given Egypt's antipathy toward Sudan, a possible motive for providing false evidence must have been evident to the U.S. government.

d. The chain of custody for the soil sample was inadequately documented, and there is therefore no way to exclude the possibility of tampering or contamination.

e. The testing methods used by the U.S. in this case did not comport with O.P.C.W. standards

for reliability. Among other things, analysts reportedly performed a lab test only on a single soil sample at a single laboratory, in breach of the most basic testing protocols, including the use of multiple labs to guard against false positives. EMPTA is chemically similar to several commercially available products, including the familiar suburban weed-killer called "Round Up." In addition, the chemical structure of EMPTA resembles fonofos, an agricultural pesticide that is commercial available in Africa. As a consequence, if not carefully preserved and quickly tested, testing on a single soil sample could readily have misidentified the key ingredient.

34. An extensive set of samples taken in October 1998 from soils around the Plant, from laboratory areas inside the Plant that remained covered by the roof, and from the Plant's septic or "soak-away" tank were tested by two leading European laboratories, including TNO Prins Maurits in the Hague, one of the premier labs in the world for chemical weapons testing. Because tests showed that EMPTA would not have broken down in the soak-away sludge, the soak-away tank provided a particularly probative time capsule of previous activities at the Plant. All of the many samples taken from the Plant an dits surroundings, including those from the soak-away tank showed no trace of either EMPTA or EMPA.

2. Commercial Use

35. At the same time it incorrectly claimed that the Plant produced chemicals for weapons, the U.S. Government also insisted that the Plant was not a legitimate pharmaceutical facility because it produced no commercial products.

a. On August 20, 1998, a "senior intelligence official" stated at a Department of Defense briefing that the Plant was "supposed to make pharmaceuticals. We have no evidence, have seen no products, commercial products that are sold out of this facility."

b. That same day, National Security Advisor Berger described the Plant as a "so-called pharmaceutical plant." Three days later, he stated that the Plant "was used to produce a chemical that is used in the manufacture of VX nerve gas and has no other commercial distribution as far as we understand. We have physical evidence of that fact and very, very little doubt of it."

36. The Plant did produce legitimate commercial products. In fact, it supplied over half of all human and veterinary pharmaceuticals in Sudan; it had 33 registered commercial products; and it had been specifically approved by the United Nations to supply veterinary medicines. Moreover, the United States could have confirmed these facts through rudimentary investigation in Sudan or by contacting the United Nations.

37. The erroneous U.S. claim that no commercial products were made at El-Shifa was based on an analyst's survey of an Internet website for EI-Shifa, which allegedly did not list any commercial products made at the Plant.

38. On September 4, 1998, Secretary of Defense Cohen reportedly acknowledged that, when the United States launched cruise missiles against the Plant, it was unaware that the Plant made medicine and that the United States did not learn until several days after the attack that the Plant made medicine.

Five days later, Assistant Secretary of Defense for Public Affairs Bacon confirmed that the United States did not know until three days after the attack that the Plant made medicine.

3. Security Provisions

39. The United States claimed that the Plant was protected by unusual security measures. For example, at a Department of Defense briefing on August 20, 1998, a "senior intelligence official" said that "[t]he facility also has a secured perimeter and it's patrolled by the Sudanese military." Similarly, the Department of State described the destroyed facility as "located within a secured chemical plant."

40. In fact, El-Shifa was not guarded by the Sudanese military or protected by any elaborate security measures. Indeed, the level of security at the Plant was lower than at many urban American public schools. The Plant was bordered by a simple six-foot fence. It stood open to the street between a power station and a candy factory in a section of North Khartoum within a few kilometers of a residential neighborhood that includes the residences of ambassadors to the Sudan from France, Germany, Korea, Russia, India, and Saudi Arabia. In addition, the personnel assigned to plant security were unarmed and dressed in regular plant overalls, not in military uniforms.

41. In addition, security inside the Plant was not strict. Shop-floor workers were allowed to wander freely throughout the Plant during meal-times and rest-breaks. Moreover, visitors were taken to all parts of the Plant.

42. Satellite imagery of the Plant released by the Pentagon showed no evidence of military

fortifications typical of chemical weapons installations.

4. Connection to Terrorism

43. Initially, the U.S. government insisted that Osama bin Laden had a direct financial interest in El-Shifa and that the Plant was controlled by the Sudan Military Industrial Complex Corporation, a Sudanese government-controlled company.

a. On August 20, 1998, President Clinton said the factory was a "terrorists' base of operation and infrastructure" and was "associated with the bin Laden network."

b. That same day, a "senior intelligence officer" explained at Secretary Cohen's press briefing that "we know that bin Laden has made financial contributions to the Sudanese Military Industrial Complex. That's a distinct entity of which, we believe, the Shifa pharmaceutical facility is part." Secretary Cohen himself said that bin Laden "had some financial interest in contributing to this particular facility."

c. On or about August 23, 1998, National Security Advisor Berger also said that "Osama bin Laden was providing key financial help for the plant."

44. In fact, there has never been any financial connection between the Plant and bin Laden. Osama bin Laden has never had any financial interest in the Plant, which is fully owned by El-Shifa, and he has never had any financial interest in El-Shifa. Moreover, bin Laden has not contributed in any manner to the Plant, its operation, or its owners.

45. Faced with this reality, a U.S. intelligence officer acknowledged to the press on August 25, 1998 that there was no direct financial relationship between the Plant and bin Laden. On September 2, 1998, Secretary of Defense Cohen acknowledged that the financial connection between the Plant and bin Laden was at most "indirect."

46. In fact, the United States has found no evidence of even an "indirect" financial link between the Plant and bin Laden. The claimed connection was instead based on the assumption that El-Shifa was part of the Sudan Military Industrial Complex Corporation, which in turn was believed to have received financial support from Osama bin Laden.

47. The Plant is, however, 100% owned by El-Shifa, and the Sudan Military Industrial Complex Corporation has never had any ownership interest in either the Plant or in El-Shifa. Moreover, the Plant produced civilian medicines and was never part of anything that could be regarded as Sudan's "military industrial complex."

48. Mr. Idris is not a member or supporter of the political party that controls the government of the Sudan and the Sudan Military Industrial Complex Corporation. To the contrary, he is a well-known supporter of a Sudanese political party that opposes the current government of the Sudan, and he regularly writes a thoughtful, dispassionate column in a Cairo-based newspaper that is critical of the current Sudanese regime.

F. Public Criticism of the Initial Justifications

49. Starting after the day of the attack, the U.S. decision to destroy the Plant encountered a firestorm of criticism as journalists investigated the Plant and

the justifications offered for its destruction. Within ten days after the attack, those justifications had been refuted in the mass media around the world. For instance:

a. The *Chicago Tribune* reported on August 28, 1998 that "American and European chemical weapons experts say the information presented so far to justify the attack on the Sudan factory is inconclusive." "Since the attack, ... the Clinton Administration has altered its arguments, sometimes in the face of ambiguous evidence. Officials now admit that the plant produced medicines sold commercially in Sudan. Scientists in the U.S. and Europe maintain that the chemical EMPTA has potential commercial applications as well as being a precursor for VX nerve gas. New reports also raise questions about the plant's links to bin Laden's financial empire."

b. That same day, *The Wall Street Journal* reported that an Italian pharmaceutical executive intimately involved with the Plant had confirmed that the Plant was not a chemical weapons facility. Dino Romanatti, whose Milan company supplies powders that generic drug-makers form into pills, told *The Wall Street Journal* that he was given the run of the Plant in long visits in February and June 1998. He stated that the managers even left him and his staff alone in the factory when they worked late and gave them keys to the main office to make international phone calls. Romanatti stated: "I didn't see any equipment -- and there wasn't even the space -- for any production of chemicals .... The availability of tools in the factory was close to zero, a saw. To imagine a plant that makes chemical

weapons is absolutely incredible . . . . [N]either the management nor the management style changed after the sale to Salah Idris."

c. *The New York Times* stated on August 29, 1998 that "some of the key statements made by Administration officials to justify the attack have proven to be inaccurate, misleading or open to question." The officials' "descriptions of the plant as a highly secretive, tightly secured military-industrial site, their initial statement that the plant produced no commercial products, and their statements that the exiled Saudi millionaire, Osama bin Laden, directly financed the plant, do not appear to be factual."

d. On that day, *Agence France Presse* likewise reported that "experts say" unanswered "questions have case a shadow of doubt over U.S. assertions that a key nerve gas ingredient was being made" at El-Shifa.

e. The *Economist* also reported at that time that "there was a growing consensus among diplomats and journalists in Khartoum that American intelligence had boobed." The author stated that, after spending "more than two hours clambering over – and under -- the smoking ruins," he "found nothing to suggest that it was anything but a plant producing medicine for humans and veterinary drugs for animals. There was no sign of the hidden laboratories or storage rooms underground which some had darkly hinted at."

50. Bobby May, President Clinton's friend who visited the Plant days before its destruction, said that he was sure that the U.S. government "had somehow got it terribly wrong."

51. American and European engineers and consultants who helped build, design, and supply the Plant have stated that it was not a chemical weapons facility. Tom Carnaffin, a British mechanical engineer who served as El-Shifa's technical manager during its construction from 1992-1996, said that the Plant "just didn't lend itself to making chemical weapons." He has also stated that the Plant mixed pre-formulated chemicals into medicines and lacked the space to stockpile or manufacture other chemicals. "It wasn't a large plant. Part of it was used to make veterinary medicines and ointments and part for human medicines. There was never anything like [making chemical weapons precursors]. It was a very open situation. Many people from different countries visited the factory. It would have been a very difficult thing to do [making precursors]. That wasn't the intent of the factory at all."

52. Henry R. Jobe, a retired pharmaceutical consultant who helped design the Plant in 1996, as well as other plants in the Middle East, said that the Plant's choice of equipment did not include any of the laboratory equipment needed to make chemical weapons.

53. O.P.C.W. criticized the U.S. action. In an article appearing in *The New Yorker* on October 12, 1998, a senior O.P.C.W. inspector was reported to have stated that EMPTA was unlikely to have been found unaltered in the ground, as the U.S. asserted, because EMPTA is highly reactive and once in the earth would react with other chemicals and begin to break down. In fact, the inspector said that, given EMPTA's reactive nature, it was incredible to suggest that EMPTA could be isolated from a sample taken

from the soil outside El-Shifa if it "came out of a smokestack or in effluent." "The only way this material could be in the ground is if somebody had emptied a flask . . . and then taken a sample. That's credible."

54. The timing of the attack on the Plant, which occurred in the midst of intense publicity concerning President Clinton's grand jury testimony and his politically-unsuccessful address to the nation on the Lewinsky matter delivered three days earlier on August 17, 1998, led to speculation in the media that the attack was an attempt to divert attention from President Clinton's embarrassing personal and political problems.

G. The Revised Justifications

55. Faced with overwhelming evidence that El-Shifa was a pharmaceutical processing facility that could not have been producing chemical weapons, U.S. officials constructed a series of revised explanations that retreated from their earlier statements, but never admitted that a mistake had been made.

56. On August 28, 1998, an "Administration official" was quoted in *The New York Times* as suggesting that EMPTA may have been stored, rather than manufactured at El-Shifa: "You could spin several scenarios as to why EMPTA [a precursor chemical] was found at the plant, including suppositions that the chemical was stored or transported there."

57. On September 2, 1998, Secretary of Defense Cohen admitted that when "the United States launched cruise missiles against [El-Shifa], it was

unaware that the plant made medicines . . . . [T]he United States did not learn until at least three days after the attack on the plant that it made medicine."

58. On September 8, 1998, Pentagon spokesman Kenneth Bacon retreated to the following vague justification: "I'm not saying the plant was capable of making VX. I'm saying we thought this was a plant that was a part of [a] program or part of a scheme to manufacture VX. Where it fit in I'm not going to comment at this stage."

59. In a PBS "Frontline" documentary aired in April 1999, National Security Advisor Samuel R. ("Sandy") Berger backed away from earlier claims that El-Shifa was producing chemical weapons and had a financial link to bin Laden: "I don't think that -- I think that is not necessarily the case. I think it is certainly true that the plant was associated with chemical weapons."

60. The U.S. government also revised its claim that bin Laden provided financial support for El-Shifa. On August 24, 1998, an "Administration official" stated that bin Laden "has no direct investment in the pharmaceutical plant, but has ties to Sudan's state-run military industrial complex."

61. On August 25, 1998, a "U.S. intelligence official" told the press that "there is no direct financial relationship between the plant and bin Laden."

62. On September 2, 1998, Secretary of Defense Cohen acknowledged that the "financial connection between the plant and Mr. bin Laden was at most indirect."

G The Defamation of Mr. Idris

63. The criticism engendered by the attack on the Plant was profoundly embarrassing to the United States officials responsible for misidentifying the Plant and causing its destruction.

64. In the face of mounting public criticism, U.S. officials had a strong incentive to find a new justification for their attack. Accordingly, rather than admit that a terrible mistake was made in destroying Mr. Idris' property, U.S. officials compounded the damage to Mr. Idris by inventing new justifications for their actions that defamed Mr. Idris through public depiction of Mr. Idris as an associate and supporter of terrorists.

65. The U.S. officials who authorized the attack did not know who owned El-Shifa at the time of the attack. Instead, as mentioned above, they erroneously assumed that El-Shifa was owned by the government of Sudan.

66. By August 23, 1998, news reports had identified Salah Idris as the owner of El-Shifa. Beginning in the last week of August 1998, unidentified U.S. government officials made numerous statements to news reporters falsely describing Salah Idris as an associate of Osama bin Laden and international terrorist organizations. These statements were published in a series of newspaper articles in the United States and around the world. These articles include, but are not limited to, the following examples:

a. On August 27, 1998, *Newsday* reported:

> Yesterday, a Washington official told Newsday that Idris, the owner of record of

> the pharmaceutical plant, is a partner with Bin Laden in other Sudanese businesses and is a financial supporter of Hassan Al-Turabi's National Islamic Front.

b. On September 1, 1998, *The Washington Post* reported:

> New evidence obtained since the attack, one official said yesterday, starts to make the link between the plant's current owner, Salaheldin Idris, and bin Laden "more direct." Some reports that U.S. intelligence has gathered suggest that Idris, who purchased the plant in March, may have done so on bin Laden's behalf, officials said.
>
> "What we're learning about [Idris] leads us to suspect that he's involved in money laundering, that he's involved in representing a lot of bin Laden's interests in Sudan," one official said.

c. On September l, 1998, the *Los Angeles Times* reported that "[a]ccording to intelligence," Mr. Idris was "a front man or agent for bin Laden."

d. On September 1, 1998, *Agence France Presse* reported that according to "an intelligence official speaking on condition of anonymity" intelligence collected after the August 20 strike concerning Mr. Idris "'increasingly points to ties with (Osama) bin Laden.'"

e. On September 4, 1998, *Deutsche Press-Agentur* reported that U.S. government officials "briefing reporters on the basis of no further identification: claimed that "the owner and manager

of the plant were identified by U.S. intelligence as front men for bin Laden."

f. On October 4, 1998, *The New York Times* stated that, according to "U.S. intelligence officials," Mr. Idris "has had financial dealings with members of Islamic Jihad, an Egypt-based group responsible for the assassination of President Anwar el-Sadat in 1981. Islamic Jihad, in turn, receives money and sponsorship from Mr. bin Laden and has been absorbed into his terror network . . . ." These officials also reported that Mr. Idris "launders money for international Islamic groups, and that he also has a stake in a company in Sudan that is 40 percent owned by the Military Industrial Corporation, a Government entity that the United States says controls Sudanese chemical weapons development."

67. All of these claims were given to news reporters by U.S. officials on condition that their identity as sources not be disclosed. In each case, the information provided constituted selective leaking from, or characterization of, classified intelligence reports.

68. All of these charges are false. Mr. Idris has never met Osama bin Laden; he is not a partner with bin Laden in any business ventures and has never had any dealings with bin Laden, commercial or otherwise; and he is not a financial supporter of bin Laden or Islamic Jihad. Moreover, Mr. Idris maintains a residence and does business in Egypt, which would not be possible if the Egyptian government believed he had any ties to Islamic Jihad, which was responsible for the assassination of Anwar Sadat.

69. The U.S. government has previously declined to defend its allegations that Mr. Idris is associated with terrorism.

70. Four days after the attack on the Plant, the U.S. Department of the Treasury, Office of Foreign Assets Control, sent a letter to the Bank of America ordering that bank accounts containing some $24 million held by Mr. Idris be blocked pursuant to the authority of the Treasury Department under the Terrorism Sanctions Regulations, 31 C.F.R. Part 595. By freezing Mr. Idris' accounts under these regulations, the United States publicly branded Mr. Idris as an individual providing assistance to terrorists.

71. On February 16, 1999, Mr. Idris filed an action against the United States in the United States District Court for the District of Columbia to unfreeze the accounts.

72. On May 3, 1999, the day on which the government's answer was due to be filed, the United States Treasury Department issued an order unblocking the accounts, thereby effectively conceding the litigation.

73. The United States has not, however, retracted any of its statements indicating that Mr. Idris is an associate of bin Laden and a supporter of international terrorism. To the contrary, even on the day the Treasury Department unblocked Mr. Idris' accounts, government officials continued to justify their actions with statements intended to suggest that Mr. Idris was, in fact, associated with terrorism. Speaking to the Associated Press on condition that his name not be revealed, a "senior administration

official" made the following statements on May 3, 1999:

> "We made a judgment that we had concerns regarding Mr. Idris based on sensitive information, but we're not prepared to compromise those sources for the sake of this case."
>
> "We have concerns about Mr. Idris and his business dealings," the senior administration official said. "There are things that Mr. Idris has associated himself with that I think that every American would find reprehensible ... we will continue to monitor his network for any potential threat to U.S. interests."

H. Subsequent Investigations

74. The day after the attack, the government of the Sudan opened the destroyed Plant to an inspection tour by diplomats in Khartoum from more than a dozen nations and called for a United Nations inspection to prove that no chemical weapons activity existed at El-Shifa. The United States used its position at the United Nations to block any inspection by the United Nations or by any other impartial international authorities.

75. The United States also refused to permit the soil sample on which it relied to be re-tested by independent labs or to reveal any detail about the testing procedures that had been used to allegedly detect EMPTA.

76. After the attack, U.S. intelligence agencies, including the Central Intelligence Agency, attempted to find information that would confirm the alleged association between the Plant and chemical weapons,

including the presence of EMPTA. They were unable to do so.

77. The U.S. State Department's Bureau of Intelligence Research drafted a report that found inadequate the evidence on which the Administration relied to support the attack on the Plant. Thomas R. Pickering, Under Secretary of State for Political Affairs directed that this report should not be completed. Mr. Pickering's directions to suppress this report overruled the objections of Assistant Secretary Phyllis Oakley, a highly-respected, career State Department official with responsibility for the Bureau of Intelligence and Research.

78. Independent investigations by various parties have found no support for any of the justifications offered by the United States for the destruction of El-Shifa.

79. Patrick Eddington, a former CIA photo analyst, reviewed satellite imagery of the Plant before and after the attack released by the Pentagon and found no evidence whatsoever of military fortifications typical of chemical weapons installations. His conclusion is that the Plant was solely a pharmaceutical facility.

80. Former U.S. Attorney General Ramsey Clark led a fact-finding mission to El-Shifa in September 1998, interviewing surviving workers, families of the victims, and U.N. representatives. Clark apologized for the attack and called on the U.S. to make financial restitution.

81. An extensive report by the investigative firm of Kroll Associates concluded that Mr. Idris has no connections to bin Laden. The report found that El-Shifa was a legitimate pharmaceutical plant and did

not manufacture EMPTA, other precursors, or VX gas. Kroll found no ties between the Plant and either the Iraqis or the Sudanese military industrial complex and determined that the Plant was lightly guarded by unarmed men dressed in overalls.

82. Repeated examinations of the evidence by journalists have found the justifications offered by the U.S. for the attack to be factually unsupported. For instance:

a. On July 25, 1999, *The Washington Post* summarized evidence refuting the government's justifications and reported that "[a] growing chorus of critics around the world seemed unconvinced by the administration's 'compelling' evidence . . . ."

b. On October 27, 1999, *The New York Times* stated that "[r]eporters visiting the ruined building saw bottles of medicine but no signs of security precautions and no obvious signs of chemical weapons manufacturing operation."

c. *The New Republic* concluded in its November 22, 1999 issue that, "[n]ow, more than 14 months later, after repeated investigative reports and repeated evasions by the Clinton administration, it is clear that the missile attack [on the Plant] was a mistake. It's time to say so."

I. Reassertion of the Government's Claim

83. On July 27, 2000, El-Shifa and Salah Idris filed an action in the United States Court of Claims to obtain just compensation for the destruction of the Plant. Notwithstanding the accumulation of evidence demonstrating that the destruction of the Plan was a mistake, United States officials responded to this

action by restating the defamatory claim that El-Shifa was involved with chemical weapons.

84. In response, State Department spokesman Phillip Reeker stated: "Nearly two years since this attack, the evidence about the purpose of this chemical plant remains persuasive." *The Washington Post* reported on September 27, 2000 that CIA Director George J. Tenet and other senior administration figures continue to maintain that the Plant "had at least a tangential connection to chemical weapons."

J. Exhaustion of Administrative Remedies

85. On July 28, 2000, through counsel, Plaintiffs submitted a claim under the Federal Torts Claim Act to the Central Intelligence Agency for compensation for the injuries caused by the destruction of the Plant. In connection with that claim, Plaintiffs also requested retraction of the United States' accusations that they were involved with international terrorism.

86. On August 17, 2000, through counsel, Plaintiffs submitted another letter informing the Central Intelligence Agency that the destruction of the Plant was a violation of customary international law as reflected in the laws and treaty obligations of the United States.

87. On March 14, 2001, the Central Intelligence Agency notified Plaintiffs that it had denied their claims. The letter also stated that Plaintiffs could file suit in United States District Court within six months of the mailing of the notification. The letter did not, however, identify any defects in Plaintiffs' claims.

COUNT ONE

Claim for Negligence Under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674

88. Plaintiffs incorporate herein by reference the allegations contained in the preceding paragraphs, as though the same were fully set forth at length herein.

89. After the attack on the United States embassies in Kenya and Tanzania in August 1998, U.S. officials working in the United States at the Central Intelligence Agency and perhaps other agencies as well, as part of their duties as employees of the United States, gathered and analyzed information concerning the Plant in order to determine whether it produced chemical weapons or was associated with terrorist activities.

90. In making these determinations, these officials were analyzing information, not exercising any policy discretion or policy judgment.

91. These officials could reasonably foresee that the Plant might be attacked as a result of their determinations and that the Plant and its owners would be injured by any such attack.

92. The officials determined that the Plant was producing chemical weapons and was connected with international terrorism based upon inadequate investigation, unreasonable speculation, and otherwise negligent analysis that fell far below the standard of care demanded of, and normally exercised by, officials making such determinations.

a. In determining that the Plant produced chemical weapons, the officials unreasonably relied upon a single soil sample that was supplied by a party of dubious credibility.

b. The officials failed to test the sample according to established scientific procedures, and they failed to document the chain of custody properly.

c. The officials unreasonably concluded that EMPTA could have been deposited and remained present in soil surrounding the Plant.

d. The officials concluded that EMPTA had no commercial use without checking O.P.C.W. schedules showing that the chemical has such uses.

e. The officials unreasonably concluded that El-Shifa was a heavily guarded military facility when that conclusion was not supported by satellite photographs and rudimentary reconnaissance at the Plant would have shown otherwise.

f. The officials determined that the Plant did not produce commercial products based upon a search of a website without making any inquiries in Sudan itself concerning El-Shifa or checking with the United Nations.

g. The officials determined that Osama bin Laden had an interest in the Plant without checking public records concerning the ownership of the Plant.

h. The officials determined that Mr. Idris was associated with Osama bin Laden or with terrorist organizations without any reasonable evidence of such an association.

93. As a result of these willful or negligent errors, the Plant was attacked, and the facilities, fixtures, equipment, and inventory of both finished and unfinished pharmaceuticals at the Plant were destroyed. In addition, the property on which the Plant stood was rendered economically unusable by the attack on the Plant.

94. In accordance with 28 U.S.C. § 2675(a), this claim was presented administratively to the Central Intelligence Agency on July 28, 2001, which denied it on March 14, 2001.

COUNT TWO

Claim for Trespass Under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674

95. Plaintiffs incorporate herein by reference the allegations contained in the preceding paragraphs, as though the same were fully set forth at length herein.

96. The United States intentionally destroyed the facilities at the Plant, its fixtures, and inventory without consent or justification.

97. The decision to attack the Plant, which led to the Plant's destruction, was made by Administration officials in Washington, and it was carried out by naval personnel operating on the high seas.

98. The United States has refused to pay just compensation for the destruction of the Plant and its fixtures.

99. In the attack on the Plant, the facilities at the Plant, fixtures, equipment, and inventory of both finished and unfinished pharmaceuticals were all destroyed. In addition, the property on which the Plant stood was rendered economically unusable by the attack on the Plant.

100. In accordance with 28 U.S.C. § 2675(a), this claim was presented administratively to the Central Intelligence Agency on July 28, 2001, which denied it on March 14, 2001.

COUNT THREE

Defamation Claim Against the United States for Declaratory and Injunctive Relief

101. Plaintiffs incorporate herein by reference the allegations contained in the preceding paragraphs, as though the same were fully set forth at length herein.

102. The President and other senior officials of the United States made statements to the press linking Mr. Idris and El-Shifa to Osama bin Laden, international terrorist organizations and the production of chemical weapons.

103. These statements were made with knowledge and intent that they would be republished by news media in the United States and throughout the world.

104. These statements were false. Mr. Idris and El-Shifa do not support Mr. bin Laden or any international terrorist organization, they have no links to Mr. bin Laden or any terrorist organization, and they have no connection to chemical weapons.

105. U.S. officials stating that Mr. Idris or El-Shifa have links to Osama bin Laden, international terrorist organizations or chemical weapons either knew that there were no such links or made their statements with reckless disregard for the truthfulness of the statements.

106. Mr. Idris is engaged in substantial business and investment activities throughout the world, including the United States. The statements made by these senior officials of the United States damaged Mr. Idris' reputation in the international business community, deterring individuals concerned that he might be linked to terrorism from doing business

with him, and impairing his ability to engage in business and investment activities in the United States and in other countries throughout the world.

107. A declaration that these statements were false would help restore the reputations of Mr. Idris and El-Shifa and improve their ability to engage in business and investment activities in the United States and in other countries throughout the world.

COUNT FOUR

Claim for Declaratory Relief For Violation of the Law of Nations

108. Plaintiffs incorporate herein by reference the allegations contained in the preceding paragraphs, as though the same were fully set forth at length herein.

109. As the United Nations Charter and various United Nation's declarations recognize, the law of nations forbids the use of force and requires that countries use peaceful means to resolve disputes.

110. Under the law of nations, a state is responsible for compensating citizens of other states for injuries resulting from any official act or omission violating the right of those individuals to property.

111. The United States government has consistently recognized in diplomatic exchanges and in international forums that under international law compensation must be "prompt, adequate, and effective." Thus, in 1938, in a famous exchange between Secretary of State Hull and the Minister of Foreign Relations of Mexico, the United States insisted that the property of aliens was protected by an international standard under which expropriation was subject to limitations -- notably, that there must be "prompt, adequate, and effective compensation."

This principle has been frequently reiterated by other State Department personnel and by the President, and in the Hickenlooper Amendments and other statutes Congress has recognized this principle as well.

112. The United States destroyed the Plant without justification.

113. The United States did not attempt to use peaceful means to resolve its alleged concerns about the production of chemical weapons at the Plant and the Plant's connection with international terrorism. Had the United States made inquiries with the Government of Sudan or otherwise used peaceful means to resolve its concerns about the Plant, it would have learned that those concerns were misplaced, and it would not have attacked and destroyed the Plant.

114. The United States has refused to provide Plaintiffs with any compensation for the destruction of the Plant.

115. The refusal of the United States to pay just compensation for the destruction of the Plant or otherwise acknowledge that the destruction of the Plant was mistaken and not justified under the law of nations has damaged the reputations of El-Shifa and Mr. Idris by fostering suspicion that they were engaged in the production of chemical weapons or other activities associated with terrorism. This damage to reputation has impaired the ability of Mr. Idris and El Shifa to engage in commercial business activities and to restore the destroyed pharmaceutical plant.

116. A declaration that the destruction of the Plant violated the law of nations would help to

restore the reputation of Mr. Idris and El-Shifa, and improve their ability to engage in pharmaceutical and other business activities in countries throughout the world.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff pray for relief and judgment against the defendant[s] as follows:

1. Damages and compensation from the United States for the destruction of the El-Shifa pharmaceutical plant in an amount not less than $50 million.

2. A declaration that claims made by agents of the United States that Mr. Idris or El-Shifa are connected to Osama bin Laden, terrorist groups or the production of chemical weapons are false and defamatory.

3. An order requiring the United States to issue a retraction in the form of a press release of claims made by officials of the United States government that Mr. Idris or El-Shifa are connected to Osama bin Laden, terrorists groups, or the production of chemical weapons.

4. A declaration that the United States attack on the El-Shifa pharmaceutical plant violated the law of nations.

5. Pre-judgment and post-judgment interest, as provided by law.

6. Reasonable attorneys' fees and costs.

7. Such other and further relief as this Court deems equitable, just and proper.

Respectfully Submitted,

/s/

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Date: April 4, 2001

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY, and SALAH EL DIN AHMED MOHAMMED IDRIS, Plaintiffs, vs. UNITED STATES OF AMERICA. Defendant.	**Civil Action No. 1:01CV00731 (RWR)**

SUPPLEMENTAL COMPLAINT

Plaintiffs El-Shifa Pharmaceutical Industries Company and Salah El-Din Mohammed Ahmed Idris hereby supplement their complaint filed on April 4, 2001 as follows:

1. In May 1998, President Clinton appointed Richard A. Clarke as the National Coordinator for Security, Infrastructure Protection, and Counter-Terrorism.

2. In this capacity, one of Mr. Clarke's primary responsibilities was to review and evaluate intelligence about terrorism. Consequently, as Mr. Clarke disclosed in his recent book *Against All Enemies,* he frequently reviewed and evaluated intelligence concerning Osama bin Laden and the al Qaeda terrorist network.

3. As Mr. Clarke also disclosed in his book, he was involved in the decision to retaliate against al Qaeda for the bombing of the United States embassies in Kenya and Tanzania, including the decision to destroy the El-Shifa plant.

4. As a result of his position and his involvement in the decision to attack the El-Shifa plant, Mr. Clarke would have known of any intelligence suggesting that Mr. Idris was associated with Osama bin Laden or any terrorist activities.

5. Mr. Clarke is unaware of any reason to believe that Salah Idris ever supported Osama bin Laden or any terrorist organization. Accordingly, in the most recent edition of his book *Against All Enemies,* Mr. Clarke wrote that "[t]he intelligence I had seen never implicated Mr. Idris in any investment by the Sudan Military Industry Commission nor in any involvement with Osama bin Laden nor any terrorist activities."

6. Upon information and belief, the U.S. officials who told reporters that Mr. Idris had business dealings with terrorists and acted as a "front man" for bin Laden did not possess any intelligence about Salah Idris that was unknown to Mr. Clarke.

Dated: January 11,2005

Respectfully submitted,

/s/

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Supreme Court, U.S.
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No. 10-328

In the Supreme Court of the United States

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the en banc court of appeals erred in unanimously affirming the dismissal of petitioners' claim for injunctive and declaratory relief based on asserted defamation by unidentified government officials concerning the 1998 bombing of a pharmaceutical plant in the Sudan by U.S. cruise missiles.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Baker v. *Carr*, 369 U.S. 186 (1962) 8, 9, 10, 16
Bond v. *United States*, 2 Ct. Cl. 529 (1866) 15
Boumediene v. *Bush*, 553 U.S. 723 (2008) 13
Chai v. *Department of State*, 466 F.3d 125 (D.C. Cir. 2006), cert. denied, 551 U.S. 1145 (2007) 12
Community for Creative Non-Violence v. *Pierce*, 814 F.2d 663 (D.C. Cir. 1987) 18
El-Shifa Pharm. Indus. v. *United States*, 378 F.3d 1346 (Fed. Cir. 2004), cert. denied, 545 U.S. 1139 (2005) 3, 10, 13, 14
Expeditions Unlimited Aquatic Enters., Inc. v. *Smithsonian Inst.*, 566 F.2d 289 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978) 18
Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) 3, 13, 14, 15
Harrison v. *United States*, 6 Ct. Cl. 323 (1870) 15
Hill v. *United States*, 8 Ct. Cl. 470 (1872) 15
Holy Land Found. for Relief and Development v. *Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004) 12
Hutchinson v. *Proxmire*, 443 U.S. 111 (1979)1 15

Cases—Continued: Page

Idris v. *Department of Treasury Office of Foreign Asset Control*, No. 1:99-cv-00472 (D.D.C. May 5, 1999) 12

Japan Whaling Ass'n v. *American Cetacean Soc'y*, 478 U.S. 221 (1986) 9

Joint Anti-Fascist Refugee Comm. v. *McGrath*, 341 U.S. 123 (1951) 17

La Plante v. *United States*, 6 Ct. Cl. 311 (1870) 15

Rasul v. *Bush*, 542 U.S. 466 (2004) 3, 13

Sanchez-Espinoza v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985) 18

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 7

United States v. *Munoz-Flores*, 495 U.S. 385 (1990) 8

Wisniewski v. *United States*, 353 U.S. 901 (1957) 15

Constitution, statutes and rule:

U.S. Const.:

Art. I, Sec. 6, Cl. 1 (Speech or Debate Clause) 15

Art. II, Sec. 9, Cl. 2 (Suspension Clause) 13

Administrative Procedure Act:

5 U.S.C. 702(1) 18

5 U.S.C. 702(2) 16

5 U.S.C. 704 16

5 U.S.C. 706 16

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 12

Statutes and rule—Continued: Page

Federal Tort Claims Act:
28 U.S.C. 2674 4
28 U.S.C. 2680(a) 17
28 U.S.C. 2860(h) 17
International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* 12
8 U.S.C. 1189 12
28 U.S.C. 1346(b) 4
Fed. R. App. P. 59(e) 5

Miscellaneous:

Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 Pub. Papers 1464 (Aug. 21, 1998) 2

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-48a) is reported at 607 F.3d 836. The panel opinion of the court of appeals (Pet. App. 49a-76a) is reported at 559 F.3d 578. The district court's memorandum opinion dismissing the complaint (Pet. App. 84a-99a) is reported at 402 F. Supp. 2d 267. The district court's memorandum order denying petitioners' motion to alter judgment (Pet. App. 77a-82a) is unreported but is available at 2007 WL 950082.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2010. The petition for a writ of certiorari was

filed on September 7, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 7, 1998, a terrorist network headed by Osama bin Laden bombed the United States embassies in Kenya and Tanzania. Pet. App. 2a. On August 20, 1998, cruise missiles fired by the United States destroyed an industrial plant located in North Khartoum, Sudan. *Id.* at 104a ¶ 1, 109a ¶ 21. According to the complaint, that plant was owned by petitioner El-Shifa Pharmaceutical Industries Company (El-Shifa), which in turn was principally owned by petitioner Salah El Din Ahmed Mohammed Idris. *Id.* at 105a ¶¶ 2-3.

President Clinton announced that he had ordered the strike because the facility was "associated with the bin Ladin network" and was "involved in the production of materials for chemical weapons." Pet. App. 3a. The President explained that "[o]ur target was terror; our mission was clear: to strike at the network of radical groups affiliated with and funded by Usama bin Ladin, perhaps the preeminent organizer and financier of international terrorism in the world today." *Ibid.* "In a letter to Congress 'consistent with the War Powers Resolution,' the President reported that the strikes 'were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities' and 'were intended to prevent and deter additional attacks by a clearly identified terrorist threat.'" *Ibid.* (quoting Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 Pub. Papers 1464, 1464 (Aug. 21, 1998)). In a radio address the next day, the President explained that "our goal was to destroy, in

Sudan, the factory with which bin Ladin's network is associated, which was producing an ingredient essential for nerve gas." *Id.* at 3a-4a.

2. Petitioners first filed suit against the United States in the Court of Federal Claims (CFC), alleging that the destruction of the El-Shifa plant amounted to a compensable taking and seeking $50 million in damages. Pet. App. 6a. The CFC dismissed the case and the Federal Circuit affirmed, holding that petitioners' suit presented a nonjusticiable political question and explaining that the court could not properly review the President's determination that the El-Shifa plant was enemy property. *El-Shifa Pharm. Indus. Co.* v. *United States*, 378 F.3d 1346, 1365-1366 (2004). The court held that "where the President's own assessment of the offensive posture of the Nation's enemies overseas leads him to conclude that the Nation is at risk of imminent attack, we cannot find in the Constitution any support for judicial supervision over the process" by which the President determines that a particular military target is appropriate. *Id.* at 1366. The Federal Circuit rejected petitioners' contention that this Court's recent decisions in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), and *Rasul* v. *Bush*, 542 U.S. 466 (2004), supported their claim. *El-Shifa Pharm. Indus.*, 378 F.3d at 1369. This Court denied certiorari. See 545 U.S. 1139 (2005).

3. a. In April 2001, while the CFC suit was pending, petitioners filed this action against the United States, alleging that the destruction of the El-Shifa plant was not justified and seeking damages and declaratory and injunctive relief. Pet. App. 104a-140a. Petitioners alleged that "[t]here was no factual warrant for selecting the Plant for destruction," and that the plant had no connection "to bin Laden or to terrorism." *Id.* at 110a

¶ 24. They challenged the reliability of the evidence cited by the United States to support the assertion that the plant was a chemical weapons facility, and faulted the way intelligence information was gathered and analyzed. *Id.* at 113a-115a ¶¶ 30-33, 117a-118a ¶¶ 39-42, 130a-131a ¶¶ 78-82. Petitioners further alleged that "U.S. officials" "invent[ed] new justifications" for the strike by publicly depicting El-Shifa's owner, petitioner Idris, "as an associate of Osama bin Laden and international terrorist organizations." *Id.* at 125a-127a ¶¶ 64 and 66.

Counts One and Two of the complaint asserted claims for damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2674. Pet. App. 133a-135a ¶¶ 88-100. Count Three alleged that petitioners were defamed by statements to the press made by "[t]he President and other senior officials of the United States." *Id.* at 136a ¶ 102. Count Four asserted that the destruction of the El-Shifa plant and the failure to compensate petitioners for that loss violated the law of nations. *Id.* at 137a-139a ¶¶ 108-116. The complaint sought damages, a "declaration that claims made by agents of the United States that [petitioners] are connected to Osama bin Laden, terrorist groups or the production of chemical weapons are false and defamatory," an order requiring the United States to issue a press release retracting those statements, and a declaration that "the United States attack on the El-Shifa pharmaceutical plant violated the law of nations." *Id.* at 139a ¶¶ 1-4.

b. The district court granted the government's motion to dismiss. The court concluded that petitioners' claims under the FTCA were barred by the statute's discretionary function exception, Pet. App. 91a, and

found no waiver of sovereign immunity for petitioners' defamation or law-of-nations claims, *id.* at 91a-92a. The district court further concluded that petitioners' claims "likely present a nonjusticiable political question over which the court would lack jurisdiction." *Id.* at 99a. The court then denied petitioners' motion to alter its judgment under Federal Rule of Civil Procedure 59(e). *Id.* at 77a-82a.

4. In a divided opinion, the court of appeals affirmed.[1] Pet. App. 49a-76a. The panel majority held that the case was properly dismissed because it "presents a nonjusticiable political question." *Id.* at 50a. Judge Ginsburg concurred in the judgment in part and dissented in part. *Id.* at 61a-76a. With respect to the defamation claim, Judge Ginsburg would have reversed because, in his view, further factual development was necessary to determine whether the defamation claim presents a nonjusticiable political question. *Id.* at 65a-74a. The panel's decision was vacated when the court of appeals granted rehearing en banc. *Id.* at 100a-101a.

5. On rehearing en banc, the court of appeals unanimously affirmed the district court's dismissal of petitioners' suit. Pet. App. 1a-48a.

a. In his opinion for the court, Judge Griffith, joined by four other judges, held that petitioners' claims were foreclosed because they raise nonjusticiable political questions. Pet. App. 2a-30a. The court recognized that although disputes "involving foreign relations * * * are 'quintessential sources of political questions,'" "'it is error to suppose that every case or controversy which

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[1] Petitioners did not pursue their FTCA claims on appeal. Petitioners did pursue their law-of-nations claim on appeal, but do not seek this Court's review on that claim. Pet. 7-8 n.2.

touches foreign relations lies beyond judicial cognizance.'" *Id.* at 10a (citation omitted).

As relevant here, the court concluded that adjudicating the defamation claim would require it "to determine the factual validity of the government's stated reasons for the strike," but that the political question doctrine precludes the courts from assessing "the merits of the President's decision to launch an attack on a foreign target." Pet. App. 16a. The court rejected petitioners' argument that "even if the political question doctrine bars review of the President's initial justifications for the attack, the court may nevertheless judge the veracity of subsequent justifications" by other government officials. *Id.* at 21a-22a. As the court explained, the factual premise of that argument is flawed because, based on its reading of the complaint, the later justifications "are fundamentally the same as the initial justifications" and, thus, "the veracity of the allegedly defamatory statements is 'inextricably intertwined' * * * with the merits of the actual justifications for the attack." *Id.* at 22a, 25a (citation omitted); *id.* at 30a (concluding that adjudicating petitioners' defamation claim would permit a "foreign target of a military strike" to "challenge the wisdom of retaliatory military action taken by the United States").

The court also rejected petitioners' reliance on cases involving military detention and the seizure of enemy property because there, unlike here, "the Constitution specifically contemplates a judicial role." Pet. App. 25a-26a. Finally, the majority would not have found petitioners' claims "so unsound as to warrant dismissal" on jurisdictional grounds, as the concurring judges did (p. 7, *infra*), but it recognized that "[p]erhaps the district court would have dismissed [petitioners'] claims for fail-

ure to state a claim * * * had the case proceeded to the merits." Pet. App. 29a.

b. Judge Kavanaugh, joined by three other judges, concurred in the judgment on the ground that petitioners' claims are "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Pet. App. 34a (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). The concurring opinion concluded that no cause of action for defamation was available against the United States because Congress had not created a federal statutory cause of action, the Court had not recognized a federal common law cause of action, and the Administrative Procedure Act (APA) did not provide or incorporate such a federal or state law cause of action. *Id.* at 35a-37a.

The concurring judges, however, rejected the court's political question analysis. Pet. App. 30a-33a, 39a-48a. Judge Ginsburg, joined by Judge Rogers, disagreed with the proposition that the political question doctrine is triggered when the plaintiff's claim calls into question or requires a court to reassess a decision or action constitutionally committed to the Executive, in the absence of some further inquiry into what the court would decide. *Id.* at 31a. Judge Kavanaugh, joined by Chief Judge Sentelle, asserted that the political question doctrine should not apply to cases involving alleged statutory violations; rather, in such cases, the inquiry should be whether the legislation infringes on the President's Article II powers. *Id.* at 40a-41a. Judge Kavanaugh concluded, however, that "Congress has not created any cognizable cause of action that would apply to President Clinton's decision to bomb El-Shifa or later Executive Branch statements about the bombing." *Id.* at 47a.

Judge Kavanaugh therefore further concluded that because the Article II and political question issues have "an abstract and hypothetical air to them," the court should decline to address the scope of the President's Article II powers or rely on the political question doctrine. *Id.* at 48a.

ARGUMENT

Petitioners ask this Court to grant review in a case that the en banc court of appeals unanimously agreed was properly dismissed at the threshold. The majority deemed the case nonjusticiable because it would require adjudication of a political question; the other judges concurred on the ground that petitioners' claims were so insubstantial as to deprive the court of jurisdiction. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' disagreement with the court's political question ruling is largely factbound; the ruling is consistent with the Federal Circuit's decision in a related case involving the same petitioners, in which this Court denied certiorari; and the reasoning set forth by the concurring judges would provide an alternative ground for affirmance. Further review is therefore unwarranted.

1. The political question doctrine is "primarily a function of the separation of powers," *Baker* v. *Carr*, 369 U.S. 186, 210 (1962), and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States* v. *Munoz-Flores*, 495 U.S. 385, 394 (1990). It thus "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive

Branch." *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

In *Baker*, this Court identified six characteristics "[p]rominent on the surface of any case held to involve a political question":

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. To determine whether "one of these formulations" is applicable, the court must engage in a "discriminating inquiry into the precise facts and posture of the particular case." *Ibid.* As the court of appeals recognized (Pet. App. 10a-11a), although foreign and military affairs feature prominently among the areas in which the political question doctrine traditionally has been implicated, not "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211.

The en banc court of appeals correctly concluded that petitioners' defamation claim cannot be adjudicated without implicating the separation of powers concerns reflected in the political question doctrine, and that petitioners cannot obtain the extraordinary relief sought in their complaint, including an order requiring retraction

of statements made by the "President and other senior officials" about the need for the military strike and whether there is a connection between petitioners and terrorism or chemical weapons. See Pet. App. 136a-137a ¶¶ 102 and 107, 139a ¶¶ 2-3.

Petitioners do not dispute that a court could not determine the reasons for the 1998 air strike without trenching on the conduct of the military and on foreign policy. See *El-Shifa Pharm. Indus. Co.* v. *United States*, 378 F.3d 1346, 1366 (Fed. Cir. 2004) ("[W]here the President's own assessment of the offensive posture of the Nation's enemies overseas leads him to conclude that the Nation is at risk of imminent attack, we cannot find in the Constitution any support for judicial supervision over the process" by which the President determines to destroy a particular target.), cert. denied, 545 U.S. 1139 (2005). Nor do they suggest that a court could delve into the President's justifications for the air strike without creating the "potentiality of embarrassment from multifarious pronouncements by various departments on one question," or by second-guessing "policy determination[s] of a kind clearly for nonjudicial discretion," thus reflecting a "lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217; see Pet. C.A. En Banc Br. 16 n.2 (Petitioners "do not premise the defamation claim on the President's statements.").

Petitioners instead focus (Pet. 4-6, 16) almost exclusively on later and allegedly different justifications for the strike attributed to unnamed government officials cited in press reports. As petitioners recognize (Pet. 16 n.4), however, the court of appeals rejected the factual premise underlying their argument. After analyzing the allegations in the complaint, the court concluded that

the supposedly new justifications were "fundamentally the same as the initial justifications" articulated by the President and that "[t]he allegedly defamatory statements cannot be severed from the initial justifications for the attack." *Id.* at 22a; see *id.* at 22a-25a (detailed analysis of complaint's factual allegations). Because the challenged statements, "[a]t most, * * * elaborate upon the nature of the connection between the plant and bin Laden" – a connection that the President made on the day of the attack and asserted as a basis for the military action—evaluating the truth or falsity of the later statements would require the court to evaluate the truth of the President's original account of the attack. *Id.* at 23a. In these circumstances, the court of appeals correctly concluded: "Under the political question doctrine, the foreign target of a military strike cannot challenge in court the wisdom of retaliatory military action taken by the United States. Despite their efforts to characterize the case differently, that is just what [petitioners] have asked us to do." *Id.* at 30a.

The court of appeals did not, as petitioners suggest, conclude that the political question doctrine bars all claims involving "allegations offered in justification of" any and all "national-security decisions." Pet. 25. Nor did the court hold that the political question doctrine renders nonjusticiable any case in which resolution on the merits might "'reflect adversely upon a decision constitutionally committed to the President,'" or require consideration of "a justification for a prior military, national-security, or foreign-policy decision." Pet. 24, 25 (quoting Pet. App. 32a). The court of appeals closely analyzed the particular defamation claim advanced in this lawsuit and found it barred by the political question doctrine because it could not be adjudicated without

making a judicial finding as to whether the United States' military strike against the El-Shifa plant was factually justified. Pet. App. 20a (resolving defamation claim "would require the court to reconsider the merits of the decision to strike the El-Shifa plant by determining whether the government's justifications for the attack were false"). That case-specific holding does not warrant further review.[2]

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[2] Petitioners suggest (Pet. 16) that the court of appeals found the "subsequent designation of [petitioner] Idris as a supporter of terrorism" to be nonjusticiable. Congress has established mechanisms through which a person or entity may be "designated" as a terrorist by the Executive Branch, but no such designation is at issue here. Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, for example, the Secretary of State may designate an entity as a "foreign terrorist organization" (FTO) by issuing a formal order after making specified findings. See 8 U.S.C. 1189; *Chai* v. *Department of State*, 466 F.3d 125, 126-127 (D.C. Cir. 2006), cert. denied, 551 U.S. 1145 (2007). Such a designation is made reviewable by statute and has direct legal consequences, as it requires financial institutions to freeze an FTO's accounts, renders the organization's representatives ineligible for visas, and makes it a crime to knowingly provide material support to the FTO. See *id.* at 127-128. Similarly, pursuant to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, the President has issued Executive Orders authorizing the Department of the Treasury to block assets of "Specially Designated Terrorists" and "Specially Designated Global Terrorists," which are formal designations with concrete consequences that are subject to review under the APA. See generally *Holy Land Found. for Relief and Dev.* v. *Ashcroft*, 333 F.3d 156, 159-160, 162 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004). Invoking the IEEPA, petitioner Idris filed suit in 1999 to have the Department of the Treasury lift orders freezing his assets. That case was dismissed after the Department of the Treasury unblocked the accounts at issue. See *Idris* v. *Department of Treasury Office of Foreign Asset Control*, No. 1:99-cv-00472 (D.D.C. May 5, 1999). The court of appeals' decision below neither holds nor suggests that these distinct formal designations

2. a. As they did when seeking review in this Court of the Federal Circuit's decision in *El-Shifa Pharmaceuticals Industries Co.* v. *United States* (No. 04-1291 Pet. 6-8), petitioners contend (Pet. 16-19) that this Court's review is needed because the court of appeals' decision "directly and irreconcilably conflicts" with the Court's decisions involving military detention—*Boumediene* v. *Bush*, 553 U.S. 723 (2008), *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), and *Rasul* v. *Bush*, 542 U.S. 466 (2004). That argument lacks merit.

Those cases held that judicial review was appropriate when individuals raised questions regarding the Executive Branch's power to hold them in custody. See *Boumediene*, 553 U.S. at 771 (under the Suspension Clause of the Constitution, privilege of habeas corpus applies to detainees at Guantanamo Bay unless the writ is formally suspended); *Hamdi*, 542 U.S. at 509, 531 (United States citizen could challenge factual basis for his detention; emphasizing "the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law"); *Rasul*, 542 U.S. at 470 (habeas statute provided federal courts with "jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base"). In those cases, the writ of habeas corpus, grounded in the Suspension Clause, furnished a specific basis for judicial involvement. See Pet. App. 25a-26a.

In the instant case, petitioners are not in the custody of the United States. They are foreign nationals who

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are insulated from all judicial review under the political question doctrine.

seek a declaration "that claims made by agents of the United States that [petitioners] are connected to Osama bin Laden, terrorist groups or the production of chemical weapons are false and defamatory," as well as an order requiring retraction of statements made by "officials of the United States government" about the need for the military strike and petitioners' connection to terrorism and chemical weapons. Pet. App. 139a ¶¶ 2-3; *id.* at 136a ¶ 102. Nothing in the military detention cases suggests that such a claim is properly cognizable in the courts.

The plurality in *Hamdi*, the case on which petitioners principally rely (Pet. 17-18), understood that, "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." 542 U.S. at 531. Indeed, the plurality specifically observed that "initial captures on the battlefield need not receive the process [described in the opinion]; that process is due only when the determination is made to *continue* to hold those who have been seized." *Id.* at 534. Petitioners emphasize that, in *Hamdi*, the evidence supporting the legality of the continued detention pertained to the initial capture. The Court made clear, however, that it was not reviewing the initial decision to capture; it was reviewing the decision to retain the detainee in custody. *Id.* at 534-535. There is no comparable continuing conduct for a court to review here. Cf. *El-Shifa Pharm. Indus. Co.*, 378 F.3d at 1369 (concluding that petitioners' takings claim for the destruction of the El-Shifa plant presents "a fundamentally different set of facts" than those at issue in *Hamdi* and *Rasul*).

The plurality opinion in *Hamdi* does make clear that the constitutional and public interest in the President's vigorous conduct of military affairs will not invariably outweigh competing constitutional concerns. See 542 U.S. at 532-533. But "[t]his case involves no claim by [petitioners] of any constitutional right and no allegation that the President or any other officer exceeded his constitutional authority." Pet. 23. Just as the Court in *Hamdi* did not hold that the President's military decisions are always reviewable, the court of appeals in this case neither held nor suggested that such decisions are *never* subject to judicial scrutiny. As discussed above (see pp. 11-12, *supra*), the en banc court of appeals did not announce a broad, categorical rule; its holding is limited to the circumstances of this case.[3]

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[3] Cases regarding the seizure of enemy property are likewise inapposite. See Pet. 18 n.5 (citing *Bond* v. *United States*, 2 Ct. Cl. 529 (1866); *Harrison* v. *United States*, 6 Ct. Cl. 323 (1870); *La Plante* v. *United States*, 6 Ct. Cl. 311 (1870); *Hill* v. *United States*, 8 Ct. Cl. 470 (1872)). Those cases involved the interpretation and application of statutes specifically providing for circumscribed judicial review of the statutorily authorized seizure of enemy property in times of war. See, *e.g.*, *Bond*, 2 Ct. Cl. at 529 (noting that relevant statutes "confer[red] very special and limited powers"). They in no way suggest that courts can or should review public justifications by Executive Branch officials for the President's exercise of his Article II authority as Commander in Chief to launch a military strike in exercise of the United States' inherent right of self-defense. See Gov't C.A. En Banc Br. 5. And petitioners here, unlike in the Court of Claims cases, do not rely on any statutory cause of action specifically providing for such review. See pp. 16-18 & n.4, *infra*. *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979), a case arising under the Speech or Debate Clause, is likewise inapposite. See Pet. 19 n.6. A Senator's republication of statements previously made on the Senate floor was not protected in *Hutchinson* because the Speech or Debate Clause protects statements only to the extent

b. Petitioners also rely (Pet. 19-24) on Judge Kavanaugh's concurring opinion, joined by one other judge, to argue that the political question doctrine is inapplicable in cases presenting statutory challenges to executive action. This Court's review is not warranted to resolve any disagreement among the judges on the en banc court of appeals. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In his concurring opinion, Judge Kavanaugh posited that courts should not analyze cases involving statutory causes of action under the political question rubric, which is itself "a function of the separation of powers," *Baker*, 369 U.S. at 210, but instead should determine whether the relevant statute "infringes on the President's exclusive, preclusive authority under Article II of the Constitution." Pet. App. 40a. Judge Kavanaugh recognized, however, that this case presents no viable statutory challenge. *Id.* at 34a-39a. Accordingly, this case would be an exceedingly poor vehicle for deciding whether and to what extent a true statutory cause of action directed to the subject matter at issue presents a nonjusticiable political question.[4]

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they are made as part of the legislative process or deliberation. 443 U.S. at 130-133.

[4] To the extent petitioners claim to have a viable statutory cause of action under the APA, Pet. 13 n.3, 23, Judge Kavanaugh plainly disagreed. See Pet. App. 37a n.1 (Petitioners "have not contended that the relevant agency actions were arbitrary and capricious under the APA."). Indeed, Section 706 of the APA is cited nowhere in the complaint or supplemental complaint. See Pet. App. 104a-143a. And, as Judge Kavanaugh's concurring opinion explained, any such claim "would face a variety of hurdles," "including 5 U.S.C. 701(a)(2), which exempts from APA review agency action that is committed to agency discretion by law," as well as 5 U.S.C. 704, which requires "final agency action." Pet. App. 37a n.1; see also 5 U.S.C. 702(2). As explained in the

3. This case is also a poor vehicle for review of the political question ruling more generally. The en banc court of appeals unanimously concluded that this case was properly dismissed, and the reasoning set forth by the concurring judges would provide an alternative ground for affirmance.

Four judges of the en banc court correctly concluded that petitioners' defamation claim was subject to dismissal at the threshold because it is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Pet. App. 39a (citation omitted); cf. *id.* at 29a (en banc majority opinion) (disagreeing with jurisdictional dismissal but noting that petitioners' claims might be "of doubtful or questionable merit" and thus subject to dismissal for failure to state a claim).

Petitioners barely address this alternative ground for affirmance. The FTCA contains express exceptions for discretionary functions and defamation claims, 28 U.S.C. 2680(a) and (h), and in any event provides only for damages, not equitable relief. In a footnote, petitioners suggest (Pet. 12 n.3) that "numerous cases hold that the victim of a tort committed by a federal officer in his official capacity has a common-law claim for equitable relief against the United States." But the cases petitioners cite are inapposite. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951) (plurality), involved a suit against individual federal officers for unauthorized conduct and did not involve a claim against the United States. See *id.* at 135-136, 137-138. And, as Judge Kavanaugh concluded (Pet. App. 36a), neither

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text, the FTCA exempts claims based on the exercise of a discretionary function and claims based on alleged defamatory conduct. See 28 U.S.C. 2680(a) and (h).

Community for Creative Non-Violence v. *Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987), nor *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution*, 566 F.2d 289, 294 n.16 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978), held that there is a federal common-law cause of action for defamation against the United States. Petitioners' assertion of a statutory cause of action for defamation under the APA is likewise misconceived for the reasons set forth by Judge Kavanaugh. Pet. App. 36a-37a & n.1; see p. 16 n.4, *supra*. All else aside, this case, in which a declaratory judgment is sought at the behest of foreign nationals that a foreign military strike was unlawful, presents a compelling case for dismissal on equitable grounds. See *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 207-208 (D.C. Cir. 1985); 5 U.S.C. 702(1) (nothing in the APA's waiver of sovereign immunity "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground").

These considerations provide an additional reason for the Court to deny review. See Pet. App. 48a ("Given that no cause of action exists here, the political question and Article II issues in this case have an abstract and hypothetical air to them.").

* * * * *

This case does not test the boundaries of the political question doctrine. "If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target, and [petitioners] ask [the Court] to do just that." Pet. App. 16a. This Court denied a petition for a writ of certiorari seeking review of a related Fed-

eral Circuit decision in a case brought by the same petitioners, involving the same 1998 military strike, and dismissing the case on political question grounds. The same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY AND SALAH EL DIN AHMED MOHAMMED IDRIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. This Case Is An Appropriate Vehicle 1

II. This Case Raises Important Issues Warranting Review 3

III. In The Alternative, The Petition Should Be Held Pending Resolution of *American Electric Power Co. v. Connecticut* 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES

American Electric Power Co. v. Connecticut, No. 10-174 (S. Ct.) 1, 6, 7, 8

Baker v. Carr, 369 U.S. 186 (1962) 5, 6

Bell v. Hood, 327 U.S. 678 (1946) 3

Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute, 566 F.2d 289 (D.C. Cir. 1977) (en banc) 2

Free Enterprise Fund v. Public Co. Accounting Oversight Board, 130 S. Ct. 3138 (2010) 4

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 6

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 2

Lawrence v. Chater, 516 U.S. 163 (1996) 7

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 4

STATUTES

5 U.S.C. § 702 ..... 2, 3

5 U.S.C. § 706 2

ARGUMENT

This case is a good vehicle for deciding important questions about the separation of powers and the scope of the political question doctrine. Certiorari should therefore be granted. In the alternative, the Court should hold the petition until it decides *American Electric Power Co. v. Connecticut*, No. 10-174, a case in which the Court recently granted certiorari to resolve (among other things) questions about the scope of the political question doctrine.

I. This Case Is An Appropriate Vehicle

The United States argues that this case is a poor vehicle for resolving the question presented because the concurring judges suggested, as an alternative rationale for affirmance, that Petitioners' claims are too insubstantial to state a federal question. Opp. at 8, 17. But a majority of the court below reached and rejected this proffered alternative basis for affirmance, and held that, but for the political question doctrine, Petitioners would be entitled to proceed with their claims in the district court. Pet. App. 29a. The United States has not filed a cross-petition on this issue. For these reasons, a holding by this Court reversing the decision below would result in further proceedings on the merits of Petitioners' claims, making this an appropriate case for deciding the justiciability question presented by the petition.

In any event, as explained in the petition, Petitioners' claims are far from insubstantial. *See* Pet. at 12–13 n.3. Most obviously, Petitioners have raised a colorable claim challenging agency action (including the CIA's denial of a request for a retraction) as arbitrary and capricious under the

Administrative Procedure Act.[1] And Petitioners also rely on well-settled law in asserting a non-monetary common-law claim against the United States for the torts of its employees.[2] There is no doubt that these

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[1] The United States tries to elide Petitioners' APA claim by asserting that Petitioners did not cite 5 U.S.C. § 706 in their pleadings. Opp. at 16 n.4. But the complaint put the United States on notice of the APA claim by citing 5 U.S.C. § 702, the APA provision granting a right to judicial review of agency action. *See* Pet. App. 104a. Both the district court and the court below understood that Petitioners were proceeding under the APA, *see* Pet. App. 63a-65a, 67a, 74a, 79a-82a, and much of the briefing below involved whether Petitioners had satisfied APA criteria like agency action and finality, *see, e.g.*, En Banc Br. of Appellants at 40–47; Br. for Appellee on Rehearing En Banc at 36–41; En Banc Reply Br. of Appellants at 22–25; Br. of Appellants at 18–21; Br. for Appellee at 40–43.

[2] The majority below acknowledged circuit precedent permitting "a plaintiff [to] obtain a retraction from the United States for defamation by one of its officers" under "[f]ederal . . . common law." Pet. App. 29a (quoting Pet. App. 74a–75a); *see also Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst.*, 566 F.2d 289, 294 n.16 (D.C. Cir. 1977) (en banc) ("declaratory and injunctive relief may be obtained against defamatory statements by government officials"). This Court, too, has recognized that plaintiffs contesting the accuracy of the government's designation of them as enemies of the United States have an equitable claim for "violat[ion of their] common-law right to be free from defamation." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951) (plurality op.). The United States says that *McGrath* is different than this case because the defendants in *McGrath* were individual officers (sued there in their official capacities), not the United States. Opp. at 17. But Petitioners here were entitled to name *either* the United States *or* the individual officers as defendants. *See* 5 U.S.C. § 702 ("action . . . stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States"); *id.* ("[t]he United States may be named as a

claims are substantial enough to get over the jurisdictional threshold. *See Bell v. Hood*, 327 U.S. 678, 682–83 (1946). Whether the causes of action can survive "a variety of hurdles" on a motion to dismiss (Opp. at 16 n.4) is a still-open question—one whose resolution has been foreclosed by the D.C. Circuit's erroneous holding that the political question doctrine bars the federal courts from entertaining this lawsuit.

II. This Case Raises Important Issues Warranting Review

This case warrants review for two reasons. First, by holding nonjusticiable a case involving no constitutional question, the court below expanded the political question doctrine beyond its traditional limits and thereby upset the constitutional allocation of powers between Congress and the President. Pet. at 19–24. Second, the decision below flouts this Court's recent rulings on the justiciability of enemy-combatant designations. Pet. at 15–19.

1. The political question doctrine has been understood, by courts and commentators alike, to preclude judicial review only of *constitutional* questions whose resolution the Constitution itself leaves to one of the political branches. Pet. at 20–22. The United States offers no response on the merits to Petitioners' showing that, in barring review of their APA claim and their defamation claim, the court below upset the Constitution's separation of powers

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(continued...)

defendant in any such action"); *id.* § 703 ("the action . . . may be brought against the United States, the agency by its official title, or the appropriate officer").

by improperly extending the political question doctrine to preclude judicial review of non-constitutional claims involving no constitutional questions. *Compare* Pet. at 19–23 *with* Opp. at 16. In so holding, the court below endorsed an approach, for this and future cases, that implicitly precludes Congress from constraining Executive conduct in certain spheres of activity, without grappling with the important and difficult separation-of-powers analysis that ought to inform such preclusion. This is a purely legal issue that is not at all "factbound" (Opp. at 8), and it warrants this Court's review.

The United States notes that there is no circuit split on this issue, but none of the Court's recent cases on the Constitution's structural protections have, so far as we can discern, involved such a split. *See, e.g., Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3149 (2010). This reflects not only the rarity of such splits, but the need for this Court to be vigilant where one branch of government impinges on the authority of a coordinate branch, even when the potential encroachment seems "innocuous." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991). Where, as here, an approach adopted by a lower court would "*systematically* favor the Executive Branch over the Legislative Branch," Pet. App. 43a (Kavanaugh, J., concurring in the judgment) (emphasis added), the Court cannot afford to wait for an express circuit split to develop. This is especially so where, as here, the decision below represents a dramatic expansion of a doctrine beyond its conventionally understood outer limits. *See* Pet. at 20–22.

2. Even if the political question doctrine could preclude judicial review of non-constitutional questions, review is warranted here because the decision below cannot be reconciled with this Court's recent detainee cases. Pet. at 15–24. Those cases make clear that the factual basis of an enemy-combatant designation is justiciable. And judicial review of the factual basis for the government's designation of Petitioner Idris as a supporter of terrorists is all that Petitioners seek in this case.

The United States cannot persuasively distinguish the detainee cases. It suggests, as did the court below, that those cases turned on the fact that individuals were challenging their custody. Opp. at 13–14. But the political question doctrine does not focus on the nature of the harm to the plaintiff. Rather, it focuses on the nature of the "particular question posed." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Thus, while the relief sought here is different—Petitioners seek a judicial declaration and/or a retraction, not release from custody—the particular question posed is identical to the one posed in the detainee cases: the accuracy of assertions about an individual's affiliation with the enemy offered in justification of an earlier battlefield decision.

The United States contends that, in the detainee cases, the Court "was not reviewing the initial decision to capture; it was reviewing the decision to retain the detainee in custody," and that "[t]here is no comparable continuing conduct for a court to review here." Opp. at 14. To the contrary, Petitioners here are seeking review of the "continuing conduct" that occurred in the weeks following the

military attack on the El-Shifa plant—namely, the media campaign to publicly defame Petitioner Idris. *See* Pet. at 5–6. The lesson of the detainee cases is that such subsequent conduct, remote from the battlefield, is not immune from judicial review simply because it is based on the same justifications as the original battlefield decision. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 510, 512 (2004) (plurality op.) (noting that the "sole evidentiary support" for Hamdi's continuing detention was an affidavit describing "the facts and circumstances related to [Hamdi's] capture . . . and his detention by U.S. military forces"). Under the detainee cases, therefore, Petitioners' claims are plainly justiciable.[3]

III. In The Alternative, The Petition Should Be Held Pending Resolution of *American Electric Power Co. v. Connecticut*

Subsequent to the filing of the petition in this case, the Court granted certiorari in *American Electric Power Co. v. Connecticut*, No. 10-174, to resolve, *inter alia*, whether the political question doctrine

[3] The United States strives to portray the decision below as a narrow one that does not suggest that more formalized terrorist designations than the ones at issue here would be nonjusticiable under similar circumstances. Opp. at 12 n.2. But this distinction makes no sense because the D.C. Circuit's holding is premised upon the rationale that judicial review of the designation would call into question "the truth of the President's original account of the attack." Opp. at 11. Review of a more formalized designation would have exactly the same effect. Nor does it matter that more formalized designations may involve "statutes specifically providing for circumscribed judicial review." Opp. at 15 n.3. The political question doctrine derives from "separation of powers," *Baker*, 369 U.S. at 210, and Congress therefore cannot authorize judicial review of otherwise nonjusticiable questions.

bars common-law nuisance claims alleging that the defendants' emissions contributed to global climate change. The Court's decision in that case may materially impact the law applicable to this case, which would require the Court, consistent with its usual GVR practice, to grant the petition, vacate the decision below, and remand this case for further consideration. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *id.* at 181 (1996) (Scalia, J., dissenting) ("[w]e regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided" (emphasis omitted)). Among other things, this Court in *American Electric Power* may opine on whether and to what extent the political question doctrine applies where, as here and in that case, a plaintiff's cause of action raises non-constitutional claims and does not require courts to decide any particular constitutional questions. Accordingly, if the Court does not wish to grant certiorari at this time, it should, at a minimum, hold the petition until its decision in *American Electric Power*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held until this Court's decision in *American Electric Power*.

Respectfully submitted,

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